(21,373.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 577.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

LAWRENCE J. CROVO AND WALTER C. CRENSHAW, PARTNERS, TRADING AS CROVO & CRENSHAW.

IN ERROR TO THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND, STATE OF VIRGINIA.

INDEX.

	Original.	Print.
Caption	1	1
Declaration	1	1
Plea in abatement	3	2
Demurrer to declaration	4	3
Plea of *nil debit*	4	3
Pleadings filed, &c	5	3
Grounds of demurrer	5	4
Special plea	7	5
Amended declaration	7	5
Judgment	9	6
Declaration	10	7
Demurrer to evidence	12	8
Testimony of W. C. Crenshaw	13	8
A. C. Stephenson	15	10
R. C. Thompson	17	11
Joinder in demurrer	20	13
Opinion of the court	20	13
Bill of exceptions	21	14

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 17, 1909.

	Original.	Print.
Clerk's certificate	22	14
Judge's certificate	22	14
Petition for writ of error	23	15
Allowance of writ of error	24	16
Exhibit A—Order of supreme court of appeals refusing writ of error.	25	16
Assignment of errors	26	16
Bond on writ of error	28	18
Writ of error	30	19
Clerk's certificate as to writ of error	32	20
Citation and service	33	20
Clerk's certificate and return to writ of error	34	21

1 VIRGINIA:

Pleas before the Honorable John H. Ingram, Judge of the Law and Equity Court of the City of Richmond, held for the said City, at the Court-room thereof, in the City Hall, on the 8th day of May, 1908.

Be it remembered that heretofore, to-wit: At Rules held in the Clerk's Office of the said Law and Equity Court on the Third Monday in January, 1908: Came L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, by counsel, and filed their Declaration against the Western Union Telegraph Company, which Declaration is in the words and figures following to-wit:

In the Law and Equity Court of the City of Richmond.

L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, Plaintiffs, complain of The Western Union Telegraph Company, a non-resident corporation doing business in this State, Defendant.

Which said defendant is doing the business of receiving and transmitting messages for compensation, in this state, of a plea that it *rendered* unto the said plaintiff the sum of one hundred dollars, which to him the said defendant owes and from him unjustly detains, for this to-wit: that heretofore to-wit: on the 25th day of September, 1907, the said plaintiff at Richmond in the state of Virginia delivered to the said defendant company, doing business by its agents in said City, during business hours, a message addressed to S. P. Morse & Son, Brockton, N. Y., in the following words and figures, to-wit:

2 Pd. 9-25-7.

"S. P. Morse & Son, Brockton, N. Y.:

Ship at once car Black Grapes also some Niagara and Delaware if can answer at once.

CROVO & CRENSHAW."

Which said message or dispatch was then and there delivered to the said company in the morning hours, between the hours of 9 and 10 o'clock, and the said message was then and there received by the said defendant company, and the established charges were prepaid for the faithful and impartial transmission of the said message and as promptly as practicable in the order of delivery, and the said plaintiff avers that the said defendant did not transmit the said message faithfully and impartially, and as promptly as practicable and in the order of delivery; and in fact that the said defendant had not transmitted said message at the hour of 5 o'clock in the afternoon of the same day, and plaintiff is not advised that

said message was ever transmitted or delivered to sendee: Whereby and by virtue of the statute in such cases made and provided an action hath accrued to the said plaintiffs to have and demand of the said defendant the sum of one hundred dollars.

Yet the said defendant, although often requested has not as yet paid to the said plaintiff the sum of $100.00 above demanded, or any part thereof, but the same to pay hath hitherto failed and refused and still doth fail and refuse, to the damage of the said plaintiff in the sum of One Hundred Dollars. And therefore he brings his suit.

J. KENT RAWLEY, *p. q.*

3 Whereupon the defendant being summoned appeared by counsel and filed its plea in abatement, demurrer, and plea of "nil debet," which are in the following words and figures to-wit:

(*Plea in Abatement. Filed Second January Rules,* 1908.)

In the Law and Equity Court of the City of Richmond.

L. J. CROVO and W. C. CRENSHAW, Partners Trading as Crovo & Crenshaw, Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

The defendant, the Western Union Telegraph Company, by its attorney, comes and says that this court ought not to have take or maintain any further cognizance of the action aforesaid of the said plaintiffs, because the said defendant says that the supposed cause of the said action did not, nor did any part thereof, arise in the city of Richmond, Virginia, but that the supposed cause of the said action, if any, and every part thereof, arose in the city of New York in the State of New York; and that at the time of the issuing of the writ in this action the said defendant did not reside, nor was its principal office, nor did its mayor, rector, president or other chief officer reside in the city of Richmond, Virginia, but that the said defendant resided, its principal office was, and its president and chief officer resided in the city of New York in the state of New York. And this the said defendant is ready to verify.

Wherefore it prays judgment whether this court can or will take any further cognizance of the action aforesaid.

A. L. HOLLADAY, *p. d.*

STATE OF VIRGINIA,
City of Richmond, To-wit:

4 I, Julia S. Jennings, a Notary Public in and for the city of Richmond, in the State of Virginia, do hereby certify that L. J. Maxwell, Superintendent of The Western Union Telegraph Company for the First District, Southern Division, in which territory the City of Richmond, Virginia, is located, this day

personally appeared before me in my said city and made oath that the statements contained in the foregoing plea are true to the best of his knowledge, information and belief.

Given under my hand this the 20th day of January, 1908.

JULIA S. JENNINGS,
Notary Public.

My commission expires April 30, 1908.

(*Demurrer Filed 2nd January Rules*, 1908.)

In the Law and Equity Court of the City of Richmond.

L. J. CROVO and W. C. CRENSHAW, Partners Trading as Crovo & Crenshaw, Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

The defendant, the Western Union Telegraph Company, demurs to the declaration filed by the plaintiff in the above entitled action, and to each count thereof, and for cause of demurrer saith, that the same is not sufficient in law.

A. L. HOLLADAY, *p. d.*

(*Plea of "Nil Debet." Filed 2nd January Rules*, 1908.)

In the Law and Equity Court of the City of Richmond.

L. J. CROVO and W. C. CRENSHAW, Partners Trading as Crovo & Crenshaw, Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

5 And the said defendant, by its attorney, comes and says that it does not owe the said sum of One Hundred Dollars ($100.00) in the said declaration above demanded, nor any part thereof, in manner and form as the said plaintiff hath above thereof complained against it. And of this the said defendant puts itself upon the country.

A. L. HOLLADAY, *p. d.*

And at another day to-wit (In Court), April 30th, 1908.

This day came again the parties by counsel and the defendant by its attorneys filed the grounds of its demurrer to the plaintiffs' declaration. The defendant then filed a special plea in writing to which the plaintiffs replied generally. And thereupon the plaintiffs by consent of Court amended their declaration, and by consent the demurrer to the declaration in this case is considered as being filed to the declaration as amended. And the said demurrer being argued time is taken to consider thereof.

(*Grounds of Demurrer. Filed April 30th,* 1908.)

In the Law and Equity Court of the City of Richmond.

CROVO AND CRENSHAW, Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

The defendant, The Western Union Telegraph Company, demurs to the declaration filed by the plaintiffs in the above entitled action, and for cause of demurrer saith that the same is not sufficient in law, because:

1. The said declaration does not show the plaintiffs' alleged cause of action with sufficient clearness and precision to apprise the defendant (*a*) of the grounds of the plaintiffs claims, or (*b*)
6 the particular acts of negligence of which the plaintiffs complain, or (*c*) to enable the defendant to prepare and make its defense.

2. The declaration does not show the alleged cause of action with that clearness and precision required by the rules of pleading.

3. The said declaration does not show the cause of action relied upon by the plaintiffs.

4. The said declaration does not designate the negligent act complained of as the grounds for the recovery in this action.

5. The said declaration does not allege that the defendant has either done any act, or omitted any duty, for which the Virginia Statute imposes a penalty.

6. The Virginia Statute, under which the plaintiffs claim the right to recover a penalty in this action, is repugnant to Article I. Section VIII of The Constitution of the United States, as applied to the message mentioned in the plaintiffs' declaration and to the plaintiffs' alleged cause of action—and is, therefore, null and void as applied to said message and this action.

7. The penalty prescribed by the Virginia Statute cannot be recovered by the plaintiffs in this action because the Virginia Statute, under which the plaintiffs claim the right to recover in this action, is, as applied to the message mentioned in the plaintiffs' declaration and to the plaintiffs' alleged cause of action, repugnant to Article I. Section VIII. of the Constitution of the United States and, therefore, null and void.

8. The penalty prescribed by the Virginia Statute cannot be recovered by the plaintiffs in this action because the Virginia Statute, under which the plaintiffs claim the right to recover in this action, is, as applied to the message mentioned in the plaintiffs declaration, repugnant to Article I. Section VIII of the Constitution of the United States and, therefore, null and void.

7 9. The penalty prescribed by the Virginia Statute cannot be recovered by the plaintiffs in this action because the Virginia Statute, under which the plaintiffs claim the right to recover in this action, is, as applied to the plaintiffs alleged cause of action,

repugnant to Article I, Section VIII of the Constitution of the United States and, therefore, null and void.

A. L. HOLLADAY, *p. d.*

(*Special Plea. Filed April 30th*, 1908.)

In the Law and Equity Court of the City of Richmond.

CROBO AND CRENSHAW, Plaintiffs,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

The defendant, The Western Union Telegraph Company, by its attorney, comes and says that the said plaintiffs ought not to have or maintain the above entitled action against it because the said defendants says that it has neither done any act, nor omitted any duty, for which the penalty prescribed by the Virginia Statute can be imposed, because the Virginia Statute, under which the plaintiff claims the right to recover in this action is, as applied to the message mentioned in the plaintiffs declaration and to the plaintiffs alleged cause of action, repugnant to Article I, Section VIII, of the Constitution of the United States and, therefore, null and void.

A. L. HOLLADAY, *p. d.*

(*Declaration as Amended April 30th*, 1908.)

In the Law and Equity Court of the City of Richmond.

L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, Plaintiffs, complain of The Western Union Telegraph Company, a non-resident corporation doing business in this
8 State, Defendant.

Which said defendant is doing the business of receiving and transmitting messages for compensation, in this State, of a plea that it *rendered* unto the said plaintiff the sum of one hundred dollars, which to him the said defendant owes and from him unjustly detains, for this to-wit; that heretofore to-wit: on the 25th day of Sept. 1907 the said plaintiff at Richmond in the State of Virginia delivered to the said defendant company, doing business by its agents in said City, during business hours a message addressed to S. P. Morse & Son, Brockton, N. Y. in the following words and figures to-wit:

Pd. 9-25-7.

S. P. Morse & Son, Brockton, N. Y.:

Ship at once car Black Grapes also some Niagra and Delaware if can answer at once.

CROVO & CRENSHAW."

Which said message or dispatch was then and there delivered to said company in the morning hours, between the hours of 9 and

10 o'clock, and the said message was then and there received by said defendant company, and the established charges were prepaid for the faithful and impartial transmission of the said message and as promptly as practicable in the order of delivery, and the said plaintiff avers that the said defendant negligently failed to transmit the said message as promptly as practicable and in the order of delivery; which negligence occurred within the State of Virginia: whereby and by virtue of the statute in such cases made and provided an action hath accrued to the said plaintiffs to have and demand of the said defendant the sum of one hundred dollars.

Yet the said defendant, although often requested has not
9 as yet paid to the said plaintiff the sum of $100.00 above demanded, or any part thereof, but the same to pay hath hitherto wholly failed and refused and still doth fail and refuse to the damage of the said plaintiff in the sum of One Hundred Dollars And therefore he brings his Suit.

J. KENT RAWLEY, *p. q.*

And at another day to-wit: May 6th, 1908 (In Court).

This day came again the parties by counsel and the plaintiffs with the consent of the defendant filed in lieu of the declaration as amended by leave of Court on April 30th 1908 an amended declaration and by like consent of both parties the demurrer and the grounds thereof filed to said amended declaration on April 30th 1908 are to be considered and treated as filed to the amended declaration and each count thereof, this day filed by consent. And thereupon the Court sustained the said demurrer as to the second count in said amended declaration and overruled the same as to the first count. And thereupon came a jury to-wit: Chas. L. McCoull, Chas. F. Armitage, T. A. Jacob, Ro. J. Christian, James Augustine, Wm. H. Zimmerman and William Cameron being sworn well and truly to try the issues joined in this cause and the evidence being heard the defendant demurred thereto and the plaintiff joined in the said demurrer. And the jury being required to ascertain the plaintiffs' debt returned a verdict in the words following, to-wit: "We the jury upon the issue joined find for the plaintiffs the debt in the declaration mentioned to-wit: One hundred dollars subject to the opinion of the Court to be rendered upon the defendant's demurrer to the evidence."

And the said demurrer to the evidence being argued and the Court being of opinion that the evidence is sufficient in law for the plain-
10 tiffs to maintain the issue joined on their part doth overrule said demurrer.

Therefore it is considered by the Court that the plaintiffs recover against the defendant the sum of One Hundred dollars with interest thereon to be computed after the rate of six per centum per annum from the 6th day of May 1908 until paid and their costs by them about their suit in this behalf expended. And the defendant by counsel having expressed his *at*tention to apply for a writ of error from said judgment it is ordered that said judgment be suspended for a period of sixty days from the final day of the present term of

this Court upon condition that the defendant or some one for it enter into bond before the Clerk of this Court in the penalty of One hundred and fifty dollars with security to be approved by said Clerk and conditioned according to law within ten days from this date. And by consent of all parties by counsel leave is hereby given said parties to file any bills of exceptions herein within sixty days from the final day of the present term of this Court.

In the Law and Equity Court of the City of Richmond.

L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, plaintiffs, complains of The Western Union Telegraph Company, a non-resident corporation doing business in this State, defendant.

Which said defendant is doing the business of receiving and transmitting messages for compensation, in this State of a plea that it rendered unto the said plaintiff the sum of one hundred dollars, which to him the said defendant owes and from him unjustly detains, for this, to-wit: That heretofore, to-wit, on the 25th day of September 1907, the said plaintiff at Richmond, in the State
11 of Virginia delivered to the said defendant Company, doing business by its agents in said City, during business hours, a message addressed to S. P. Morse & Son, Brockton, N. Y., in the following words and figures, to-wit:

Pd. 9-25-7

"S. P. Morse & Son, Brockton, N. Y.:

Ship at once car Black Grapes also some Niagra and Delaware if can answer at once.

CROVO & CRENSHAW."

Which said message or dispatch was then and there delivered to said Company in the morning hours, between the hours of 9 and 10 o'clock, and the said message was then and there received by the said defendant Company, and the established charges were prepaid for the faithful and impartial transmission of the said message and as promptly as practicable in the order of delivery and the said plaintiff avers that the said defendant did not and negligently failed to transmit the said message as promptly as practicable; which negligence occurred within the State of Virginia, whereby and by virtue of the statute in such cases made and provided an action hath accrued to the said plaintiffs to have and demand of the said defendant the sum of one hundred dollars.

II Count.

And for this also, to-wit: That heretofore, to-wit on the 25th day of September, 1907, the said plaintiff at Richmond in the State of Virginia delivered to the said defendant Company, doing business by its agents in said City, during business hours, a message addressed to S. P. Morse & Son, Brockton, N. Y., in the following words and figures, to-wit:

12 Pd. P-25-7.

"S. P. Morse & Son, Brockton, N. Y.:

Ship at once car Black Grapes also some Niagra and Delaware if can answer at once.

CROVO & CRENSHAW."

Which said message or dispatch was then and there delivered to said Company in the morning hours, between the hours of 9 and 10 o'clock, and the said message was then and there received by the said defendant Company, and the established charges were prepaid for the faithful and impartial transmission of the said message and as promptly as practicable in the order of delivery, and the said plaintiff avers that the said defendant did not and negligently failed to transmit the said message in the order of delivery; which negligence was committed within the State of Virginia, whereby and by virtue of the statute in such cases made and provided an action hath accrued to the said plaintiffs to have and demand of the said defendant the sum of one hundred dollars.

Yet the said defendant, although often requested, has not as yet paid to the said plaintiff the sum of $100.00 above demanded, or any part thereof, but the same to pay hath hitherto wholly failed and refused and still doth fail and refuse to the damage of the said plaintiff in the sum of One Hundred Dollars.

And therefore he brings his suit.

J. KENT RAWLEY, *p. q.*

(*Demurrer to Evidence.*)

In the Law and Equity Court of the City of Richmond.

CROVO & CRENSHAW, Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

13 Be it remembered that after the jury was sworn to try the issue joined in this cause, the plaintiff and defendant introduced the following evidence, which is all the evidence that was introduced, and which is made a part of this demurrer to evidence.

The plaintiff to prove and maintain the said issue on his part introduced the following evidence:

W. C. CRENSHAW, the only witness for the plaintiff, testified as follows:

I am a member of the plaintiff firm and on September 25th, 1907, about 9:30 A. M. I filed with the defendant company, at its office in the City of Richmond, in the State of Virginia, for transmission to Brockton, in the State of New York, a message dated September 25th, 1907, addressed to S. P. Morse & Son, Brockton, N. Y., a carbon copy of which I preserved and now have in my hand and read to the jury as follows:

Pd. 9-25-7.

S. P. Morse & Son, Brockton, N. Y.:

Ship at once car Black Grapes also some Niagra and Delaware if can answer at once.

CROVO AND CRENSHAW.

that the next I heard of said message I received about 5:30 P. M. on that afternoon the following notice which I now have in my hand and read to the jury as follows:

Form No. 101. 332

The Western Union Telegraph Company.

(Incorporated.)

RICHMOND, VA., *Sept.* 25, 1907.

M. Crovo and Crenshaw:

Your dispatch dated today to S. P. Morse & Sons Brooklyn
14 New York is undelivered.

Reason: Unable to Locate party Give Better Address.

A. C. STEVENSON,
Per C.,
Manager, Richmond, Va., Office.

N. B.—Changes in the address must be paid for at the usual rates.
Recd. 5:30.

that said notice was handed to me by a boy in the uniform of the defendant company; that I then 'phoned to the office of the defendant company in the city of Richmond and asked about said message and was told in response to my 'phone communication that they would look into the matter; that I did not pay for the message at the time but it was the custom of the defendant company to send our messages for us marked "Paid" and to send us a ticket thereafter for payment; that a slip showing the charge of the defendant company for said message was thereafter sent to my firm through the defendant company's collector and was paid.

Form No. 12.

Due The Western Union Telegraph Company.
(Incorporated.)

For Messages 190–

.....

Cts.

To Brockton N. Y. 68

W. U. Telegraph Co.
Sept. 25 1907
From Richmond, Va.

Crovo & Crenshaw
Signature

Total

2—577

On cross examination this witness testified that he did not know the uniformed messenger of the defendant company who brought said notice to him about 5:30 P. M. on September 25, 1907; that he knew nothing as to when said message left the City of Richmond, in the State of Virginia, or where the delay in its transmission occurred or whether the delay occurred in the City of Richmond, Virginia, or in the City of New York, in the State of New York.

And thereupon the plaintiffs rested their case.

And the defendant company to prove and maintain the said issue on its part introduced the following evidence:

A. C. STEPHENSON, a witness for the defendant company, testified as follows:

I am employed as Manager of the defendant Company at its office in the City of Richmond, Virginia, and have been in the service of the defendant company for about 34 years; that the notice sent to the plaintiffs on the afternoon of September 25th, 1907, was sent from my office; that I had received a service message from the City of Brooklyn, in the State of New York, showing that the message involved in this suit was transmitted by the defendant to the City of Brooklyn, New York, and was undelivered in the City of Brooklyn, in the State of New York, and said notice sent from my office notified the plaintiffs of that fact and asked them for a better address; that there was not at that time any direct wire for the transmission of messages from the City of Richmond, in the State of Virginia, to either Brooklyn, in the State of New York, or Brockton, in the State of New York; that the usual and proper route for the transmission of a message from Richmond, in the State of Virginia, to either Brockton, in the State of New York, or *Brockton*, in the State of New York, was for the message to be transmitted on a through wire from Richmond, in the State of Virginia, to New York City, in the State of New York and in the City of New York, in the State of New York, taken from the wire of the defendant and written out and relaid and resent and retransmitted from New York City, in the State of New York, to the point of address, whether Brooklyn, in the State of New York, or Brockton, in the State of New York; that in the transmission of a message from New York City, in the State of New York, to Brockton, in the State of New York, the message would have to be again relaid in the City of Buffalo, in the State of New York, in the manner above described for relaying messages; that in the transmission of a message from Richmond, in the State of Virginia, to New York City, in the State of New York, over a direct wire, as above stated, such transmission is instantaneous; that is to say, when such message leaves the City of Richmond, in the State of Virginia, it instantaneously reaches the office of the defendant company in New York City, in the State of New York.

But the Court certifies that the witness Stevenson testified that the notice sent to the plaintiff at 5:30 P. M. of the evening of Sept.

25th in the usual and ordinary course of business meant that the message was sent from Richmond, Virginia, to Brooklyn, N. Y., and not to Brockton, N. Y. Court further certifies that during examination of plaintiff counsel for company cross examined plaintiff as to spelling of Brockton, New York, asking them if he did not know that Brockton N. Y. was spelt with "K" and plaintiff then tendered telegram from Brockton of the day before and delivered from defendant showing the spelling to be with "K" which message was introduced over objection of defendant, and is in *in* the following words and figures:

3214L.

Received at No. 1217 East Main Street, Richmond, Va.

44FX N9 9paid

FX BROCKTON, N. Y., *Sept.* 24, '07.

Cravo and Crenshaw, Richmond, Va.:

Offer pony wordens eleven cents today for tomorrow's shipment. 7:15

Always open.

S. O. MORSE & SON.

Money Transferred by Telegraph. Cable Office.

17 R. C. THOMPSON, another witness introduced by the defendant company, testified as follows:

I have been in the service of the defendant company for 35 years. I am now and on September 25, 1907, was Traffic Chief in charge of the defendant's telegraph office for the transmission of messages in the City of Richmond, in the State of Virginia; that it was my duty to superintend the routing and transmission of messages going from said office and I was then and am now acquainted with the usual and proper mode of routing and transmitting messages; that on September 25th, 1907, there was no direct wire for the transmission of messages from the City of Richmond, in the State of Virginia, to either Brooklyn, in the State of New York, or Brockton, in the State of New York; that the usual and proper route and routing and the one then used by the defendant for the transmission of messages by the defendant company from its said office in the City of Richmond, in the State of Virginia, to either Brooklyn, New York, or Brockton, New York, was for the message to be transmitted on a through wire from its said office at Richmond, in the State of Virginia, to its office in New York City, in the State of New York, and at the last named point taken from the wire of the defendant and written out and relaid and retransmitted from its said office in the City of New York, in the State of New York, to the point of address, whether Brooklyn, N. Y. or Brockton, N. Y.; that in the transmission of a message from New York City, N. Y., to Brockton, N. Y., the message would have to be again relaid in the City of Buffalo, New York, in the manner above described for *delay-*

ing messages; that in the transmission of a message from the defendant's said office in the City of Richmond, Virginia, to New York City, in the State of New York, as above described, such transmission is instantaneous; that is to say, when such message
18 leaves the office of the defendant in the City of Richmond, Virginia, it instantaneously reaches the office of the defendant in New York City, in the State of New York.

And the said defendant says that the matter aforesaid, so introduced and shown in evidence to the jury by the plaintiff is not sufficient in law to maintain the said issue on the part of the plaintiff, and that it, the said defendant, is not bound by the law of the land to answer the same, because:

1. There is no proof that the delay complained of occurred in the State of Virginia, and proof of that fact is necessary to sustain this action.

2. There is no proof that the delay complained of occurred in the State of Virginia and without such proof the Virginia Penalty Statute, upon which the plaintiffs rely, is, as applied to the plaintiffs' cause of action, in contravention of and repugnant to Article I, Section VIII of the Constitution of the United States, and, therefore, null and void.

2*a*. There is no proof that the delay complained of occurred in the State of Virginia and without such proof the Virginia Penalty Statute upon which the plaintiffs rely, is, as applied to the plaintiffs' cause of action, in contravention of and repugnant to Amendment XIV to the Constitution of the United States in that it gives said Penalty Statute extra-territorial effect and treats said statute as having vitality and force outside of the territorial limits of the Commonwealth of Virginia and treats said statute as giving the plaintiff a right to recover in this action for an alleged default or alleged neglect of duty on the part of the defendant which did not occur within the territorial limits of the Commonwealth of Virginia and because said Penalty Statute as construed and applied by the Court
(*a*) abridges the privileges or immunities of the defendant;
19 (*b*) deprives the defendant of its property without due process of law; (*c*) and denies to the defendant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States; and because said Statute as construed and applied by the Court in this action deprives the defendant of its property without due process of law and takes from the defendant its property without just or adequate compensation in violation of Article V of the Constitution of the United States—and for the reasons aforesaid the said Penalty Statute is null and void as applied to the plaintiffs' cause of action.

3. Because the Virginia Penalty Statute, under which the Plaintiffs seek to recover in this action, does not apply to or regulate a message filed with the defendant to be transmitted from Richmond, in the State of Virginia, to Brockton, in the State of New York, and if so construed or applied by this court, is null and void, because repugnant to Article I section VIII of the Constitution of the United States.

4. Because the Virginia Penalty Statute, under which the plaintiffs seek to recover in this action, does not and cannot apply to or regulate that part of the transmission outside of the State of Virginia of the message mentioned in the plaintiffs' declaration, and without evidence showing that a default occurred in the State of Virginia, no judgment against the defendant in this action can be sustained.

5. Because if the delay complained of occurred in the City of New York, in the State of New York, or at any other point in the State of New York, or at point outside of the State of Virginia the statute of Virginia upon which the plaintiffs rely, to sustain their action, neither has nor can have any lawful application; and if said Statute be construed to apply outside of Virginia, the said Statute is repugnant to Article I, section VIII of the Constitution of the United States, and is therefore, null and void.

20 6. Because the penalty Statute of Virginia upon which the plaintiffs rely is, as construed and applied by the Court to this action, an attempt to regulate interstate commerce in violation of Article I, section VIII of the Constitution of the United States and said Statute as applied by the court to this action is, therefore, null and void.

Wherefore, for want of sufficient matter in that behalf to the said jury showing in evidence, the defendant prays judgment, and that the jury aforesaid may be discharged from giving any verdict upon the said issue, and that the said plaintiff may be barred from giving or maintaining his action aforesaid against him.

A. L. HOLLADAY,
A. B. DICKINSON,

p. d.

And the said plaintiff joins in the foregoing demurrer to the evidence and says that the matters aforesaid to the jurors in the form aforesaid shown in the evidence is sufficient in law to maintain the issue joined on the part of the plaintiff. Wherefore the plaintiff demands judgment, and the jury being discharged after they had assessed the plaintiff's damages &c.

J. KENT RAWLEY, *p. q.*

Opinion of the Court.

Reasons for giving judgment against defendant on demurrer to the evidence—Because under rule as to demurrers to evidence in Virginia all evidence of demurrant in conflict with plaintiff's evidence is waived, and plaintiff is entitled to all inferences from defendant's evidence favorable to plaintiff, and as in the opinion of Court jury in this case from the evidence, facts and circumstances might have found that negligence occurred here in State of Va. in Richmond Office—in other words, that message was sent to

21 Brooklyn N. Y. and not to Brockton, N. Y. and the message was so sent from the Richmond Office and that delay was from about nine or nine thirty in the morning until after 5:30 in the evening at least as notice of Company shows. Judgment is given for plaintiff against defendant.

(*Bill of Exceptions.*)

In the Law and Equity Court of the City of Richmond.

CROVO and CRENSHAW, Plaintiffs,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

Be it remembered that upon the trial of this action, after the plaintiffs had introduced their evidence and the defendant had introduced its evidence, as set out in the written demurrer to evidence hereby referred to and made a part of this bill of exceptions, the defendant filed its written demurrer to the evidence, as shown in said demurrer to evidence, stating the several grounds of said demurrer to which plaintiff replied and joined in demurrer but the Court refused to sustain said demurrer and overruled the same and filed reasons therefor in writing made part of the record and entered judgment thereon in favor of the plaintiff, to which action of the Court in refusing to sustain said demurrer and in overruling the same and in entering judgment for the plaintiff instead of entering judgment for the defendant, the defendant by counsel excepted and tenders this, its bill of exceptions No. 1, which it prays may be signed, sealed and enrolled and made a part of the record in this action, which is accordingly done.

JOHN H. INGRAM. [SEAL.]

22 STATE OF VIRGINIA.
City of Richmond, To-wit:

I, P. P. Winston, Clerk of the Law and Equity Court of the City of Richmond, do hereby certify that the foregoing is a true transcript of the record and proceedings in a certain action of debt lately depending in the said Court between Crovo & Crenshaw plaintiffs, and The Western Union Telegraph Company, defendant, with all things touching the same, as fully and wholly as they now exist among the records of my office.

In testimony whereof, I have hereunto set my hand and annex the seal of the said Court, this 25th day of September 1908.

[Seal Law and Equity Court, City of Richmond, Virginia.]

P. P. WINSTON, *Clerk.*

VIRGINIA, *To-wit:*

I, John H. Ingram, only Judge of the Law and Equity Court of the City of Richmond, in the State of Virginia, do hereby certify that P. P. Winston, whose name is signed to the foregoing Certificate, is, and was at the time of signing the same, Clerk of said Court, duly qualified; that his attestation is in due form of law; that his signature is genuine, and that all his official acts are entitled to full faith and credit.

Given under my hand this 25th day of September, 1908.

JOHN H. INGRAM.

VIRGINIA, *To-wit:*

I, P. P. Winston, Clerk of the Law and Equity Court of the City of Richmond, in the State of Virginia, do hereby certify that the Honorable John H. Ingram, whose name is signed to the foregoing Certificate, is, and was at the time of signing the same, the only Judge of the said Court duly qualified.

Given under my hand this 25th day of September, 1908.

P. P. WINSTON, *Clerk.*

23 VIRGINIA:

In the Law and Equity Court of the City of Richmond.

L. J. CROVO and W. C. CRENSHAW, Partners Trading as Crovo & Crenshaw, Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

Petition for Writ of Error and Supersedeas.

Your petitioner, The Western Union Telegraph Company, a corporation chartered and existing under the laws of the State of New York, conceiving itself aggrieved by the final decision of the Law and Equity Court of the City of Richmond (Virginia) rendering judgment against it in the above entitled action on May 6, 1908, in favor of the plaintiffs in that action Lawrence J. Crovo and Walter C. Crenshaw, partners trading as Crovo & Crenshaw, for one hundred dollars and costs obtained from the Clerk of said Law and Equity Court of the City of Richmond a complete transcript of the record in said cause, duly certified and presented the same together with a petition and assignment of errors praying for the allowance of a writ of error and supersedeas to the Supreme Court of Appeals of Virginia, in term time, and that court on September 10, 1908, made a final order refusing the writ of error and supersedeas prayed for: a duly certified copy of which order of the Supreme Court of Appeals of Virginia is herewith filed marked Exhibit A and is prayed to be treated as a part of this petition.

The said order of the Supreme Court of Appeals of Virginia is a final order, and now comes your petitioner, the plaintiff in error who was the defendant in said Law and Equity Court, and prays a writ of error and supersedeas from said decision and judgment of the Law and Equity Court of the City of Richmond to the Supreme Court of the United States: and your petitioner prays that
24 said judgment of the Law and Equity Court of the City of Richmond (Virginia) may be reviewed and reversed and that judgment may be rendered in favor of your petitioner; and your petitioner hereto attaches and files as a part of this petition, its assignment of errors.

THE WESTERN UNION TELEGRAPH COMPANY,

By A. L. HOLLADAY, *Its Counsel.*

ADDISON L. HOLLADAY,

Counsel for the Petitioner.

A writ of error is hereby allowed as prayed by the petitioner, The Western Union Telegraph Company.

Let the writ of error issue upon the execution of a bond by The Western Union Telegraph Company, or some one for it, to the defendants, Crovo and Crenshaw, in the sum of $200.00 to cover costs, but said bond is not to operate as a supersedeas.

Oct. 2nd, 1908.

JOHN H. INGRAM,
Presiding and Only Judge Law & Equity Court,
City of Richmond, Va.

25 VIRGINIA:

In the Supreme Court of Appeals, Held at the Court House Thereof, in the City of Staunton, on Thursday, the 10th Day of September, 1908.

The petition of the Western Union Telegraph Company for a writ of error and supersedeas to a judgment of the Law and Equity Court of the City of Richmond, entered on the 6th day of May, 1908, in the cause then therein pending of Crovo & Crenshaw against the said Western Union Telegraph Company, having been maturely considered and the transcript of the record of the said judgment seen and inspected, the court being of the opinion that the said judgment is plainly right, doth refuse the writ of error and supersedeas prayed for.

A Copy.
Teste: A. W. MAY, *Clerk.*

[Endorsed:] "Exhibit A." 1908 October 2nd filed in clerk's office Teste. P. P. Winston, clerk.

26 In the Law and Equity Court of the City of Richmond.

L. J. CROVO and W. C. CRENSHAW, Partners Trading as Crovo & Crenshaw, Plaintiffs,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

Assignment of Errors.

The Western Union Telegraph Company, the plaintiff in error, comes and files herewith its petition praying for a writ of error and supersedeas and says that there are errors in the record and proceedings of the above entitled cause lately depending in the Law and Equity Court of the City of Richmond (Virginia), wherein Lawrence J. Crovo and Walter C. Crenshaw, partners trading as Crovo & Crenshaw, were the sole plaintiffs and your petitioner was the sole defendant—and makes the following assignment of errors.

The judgment of the Law and Equity Court of the City of Richmond (Virginia) rendered on May 6, 1908, in favor of said Crovo

and Crenshaw against your petitioner for one hundred dollars and costs was controverted and drawn in question by your petitioner, The Western Union Telegraph Company, on the ground that said judgment was and is repugnant to that part of Article 1, Section VIII of the Constitution of the United States providing that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and in contravention thereof in the following particulars;

First.

The Law and Equity Court of the City of Richmond (*a*) erred in failing to hold that the telegraphic dispatch described in the declaration of the plaintiffs, Crovo and Crenshaw, came within the regulating power of that provision of Article I Section VIII of the Constitution of the United States providing that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and (*b*) erred in
27 failing to hold that the transmission of said telegraphic dispatch was interstate commerce and not subject to the control or regulation of the Penalty Statute of Virginia under which the said Crovo and Crenshaw recovered a judgment against your petitioner, the plaintiff in error, the said statute being Section V of Chapter VIII of the Act of the General Assembly of Virginia entitled "An Act concerning public service corporations," approved January 18, 1904, and acts amendatory thereof.

Second.

The Law and Equity Court of the City of Richmond erred in failing to hold that the Penalty Statute of Virginia upon which the defendants in error, Crovo and Crenshaw, relied and obtained said judgment, viz., Section V of Chapter VIII of the Act of the General Assembly of Virginia, entitled, "An Act concerning public service corporations," approved January 18, 1904, and acts amendatory thereof, was and is, as construed and applied by said court to this action, an attempt to regulate interstate commerce in violation of that provision of Article I Section VIII of the Constitution of the United States providing that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and that said Penalty Statute of Virginia as applied by said Law and Equity Court of the City of Richmond to this action was and is, therefore, null and void.

Third.

The Law and Equity Court of the City of Richmond erred in failing to enter judgment in favor of your petitioner, the plaintiff in error, because the Penalty Statute of Virginia, upon which the defendants, Crovo and Crenshaw, relied and obtained said judgment is, as construed and applied by the Court to this action, an attempt

to regulate interstate commerce and a regulation thereof in violation of Article I Section VIII of the Constitution of the United States, and said statute as applied by the Court to this action is,
28 therefore, null and void.

For which errors, the plaintiff in error, The Western Union Telegraph Company, prays that said judgment of the Law and Equity Court of the City of Richmond may be reviewed and reversed and that a judgment may be rendered in favor of your petitioner; and that all such other and further and general and complete relief as may be proper in the premises may be granted. And your petitioner will ever pray, etc.

THE WESTERN UNION TELEGRAPH COMPANY,
By ADDISON L. HOLLADAY, *Its Counsel.*

Identified as Assignment of Errors with petition for Writ of Error and Supersedeas.

J. H. I.

L. J. CROVO and W. C. CRENSHAW, Partners Trading as Crovo & Crenshaw, Plaintiffs,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

Bond to Cover Costs.

Know all men by these presents that we, Lewis J. Maxwell as principal, and Addison L. Holladay as surety, are held and firmly bound unto Lawrence J. Crovo and Walter C. Crenshaw, partners trading as Crovo & Crenshaw, in the sum of two hundred dollars to be paid to said Crovo and Crenshaw, to which payment well and truly to be made we bind ourselves, jointly and severally, firmly by these presents. Sealed with our seals this 2nd day of October, 1908.

Whereas The Western Union Telegraph Company, plaintiff in error in a cause lately depending in the Law and Equity Court of the City of Richmond, Virginia, wherein said Crovo and Crenshaw were plaintiffs and The Western Union Telegraph Company was defendant, seeks to prosecute its writ of error to the Supreme
29 Court of the United States to reverse the judgment rendered in said cause by the Law and Equity Court of the City of Richmond (Virginia). Now, therefore, the condition of this obligation is such that if The Western Union Telegraph Company, plaintiff in error as aforesaid, shall prosecute its said writ of error to effect, and answer all costs that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

LEWIS J. MAXWELL. [SEAL.]
ADDISON L. HOLLADAY. [SEAL.]

The foregoing bond is hereby approved.

JOHN H. INGRAM,
Presiding and Only Judge Law & Equity Court, City of Richmond, Va.

The original of the foregoing bond was lodged with the Clerk of the Law and Equity Court of the City of Richmond on October 2nd 1908 and the following endorsement made thereon: "1908 October 2nd filed in Clerk's Office. Teste: P. P. Winston, Clerk."

30 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Law and Equity Court of the City of Richmond, (Virginia), Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Law and Equity Court of the City of Richmond (Virginia), before you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between The Western Union Telegraph Company, a corporation chartered and existing under the laws of the State of New York, Plaintiff in Error, and Lawrence J. Crovo and Walter C. Crenshaw, partners trading as Crovo & Crenshaw, Defendants in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of said The Western Union Telegraph Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and
31 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at the City of Washington, District of Columbia, on the 30th day of October, 1908, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the 2d day of October, in the year of our Lord one thousand nine hundred and eight.

[Seal United States Circuit Court, Eastern District of Virginia, Fourth Circuit.]

JOSEPH P. BRADY,
Clerk of the United States Circuit Court for the Eastern District of Virginia.

Allowed by
JOHN H. INGRAM,
Presiding and Only Judge Law & Equity Court, City of Richmond, Va.

[Seal United States Circuit Court, Eastern District of Virginia, Fourth Circuit.]

Writ of Error filed October 2nd, 1908.
Teste:
P. P. WINSTON, *Clerk.*

32 The foregoing original writ of error was lodged with the Clerk of the Law and Equity Court of the City of Richmond on the Second day of October 1908 and also at the same time and place two copies thereof were lodged in said Clerk's Office, one copy thereof for Lawrence J. Crovo and the other copy thereof for Walter C. Crenshaw.

The following endorsement was made upon said original writ of error and upon the two copies thereof: "Writ of Error. Filed October 2nd 1908. Teste: P. P. Winston, Clerk."

P. P. WINSTON,
Clerk of the Law and Equity Court of the City of Richmond.

33 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Lawrence J. Crovo and Walter C. Crenshaw, partners trading as Crovo & Crenshaw, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the Office of the Clerk of the Law and Equity Court of the City of Richmond, Virginia, wherein you are defendants in error and The Western Union Telegraph Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the presiding and only Judge of the Law and Equity

Court of the City of Richmond, Virginia, this 2nd day of October, 1908.

JOHN H. INGRAM,
Presiding and Only Judge Law & Equity Court,
City of Richmond, Va.

Legal service of the above citation is hereby acknowledged.

LAWRENCE J. CROVO &
WALTER C. CRENSHAW,
By J. KENT RAWLEY, *Counsel.*

34 UNITED STATES OF AMERICA:

Law and Equity Court of the City of Richmond, (Virginia), *ss.*

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the Seal of said Law and Equity Court of the City of Richmond, in the City of Richmond, Virginia, this 3rd day of October 1908.

[Seal Law and Equity Court, City of Richmond, Virginia.]

P. P. WINSTON,
Clerk of the Law and Equity Court
of the City of Richmond.

Costs of this record $10.25.

Paid by A. L. Holladay, Counsel for Western Union Telegraph Company.

P. P. WINSTON,
Clerk of the Law and Equity Court
of the City of Richmond.

Endorsed on cover: File No. 21,373. Virginia, Law and Equity Court of the City of Richmond. Term No. 577. The Western Union Telegraph Company, plaintiff in error, *vs.* Lawrence J. Crovo and Walter C. Crenshaw, partners trading as Crovo & Crenshaw. Filed October 15th, 1908. File No. 21,373.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1906.

No. [redacted]87.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

LAWRENCE J. CROVO AND WALTER C. CRENSHAW, PARTNERS, TRADING AS CROVO AND CRENSHAW.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED OCTOBER 29, 1906.

(21,390.)

(21,390.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 594.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

LAWRENCE J. CROVO AND WALTER C. CRENSHAW, PARTNERS, TRADING AS CROVO AND CRENSHAW.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

INDEX.

	Original.	Print.
Petition to the supreme court of appeals for a writ of error	1	1
Transcript of record of law and equity court	29	17
Caption	29	17
Declaration	29	17
Plea in abatement	31	18
Demurrer to declaration	32	19
Plea of *nil debet*	32	20
Pleadings, &c., filed	33	20
Grounds of demurrer	33	20
Special plea	35	21
Declaration as amended	35	22
Judgment	37	22
Declaration	38	23
Demurrer to evidence	40	25
Testimony of W. C. Crenshaw	41	25
A. C. Stephenson	43	26
R. C. Thompson	45	28
Joinder in demurrer	48	30

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 17, 1909.

	Original.	Print.
Opinion of the court	48	30
Bill of exceptions	49	30
Clerk's certificate	50	31
Order of supreme court of appeals refusing writ of error	51	31
Clerk's certificates	52	31
Chief judge's certificate	52	32
Assignment of errors	53	32
Petition for writ of error	56	34
Allowance of writ of error	57	34
Bond on writ of error	58	35
Writ of error	60	35
Certificate of clerk as to writ of error	62	36
Citation	63	37
Copy of citation, with service	64	37
Clerk's certificate and return to writ of error	65	38

1 In the Supreme Court of Appeals of Virginia.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
against
L. J. CROVO and W. C. CRENSHAW, Partners Trading as Crovo & Crenshaw, Defendants in Error.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, the Western Union Telegraph Company, a corporation charter- and existing under the laws of the State of New York, hereafter called the Telegraph Company, herewith files a duly certified copy of the record in the common law action of Crovo and Crenshaw, plaintiffs, *versus* Western Union Telegraph Company, defendants, and respectfully represents as follows:

L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, brought an action of debt in the Law and Equity Court of the City of Richmond against the Western Union Telegraph Company to recover a statutory penalty of one hundred dollars, ($100.00). They filed their declaration in January, 1908, in which they alleged that the Telegraph Company failed to transmit a telegraph dispatch "faithfully and impartially and as promptly as practicable and in the order of delivery," to which the Telegraph Company demurred. On April 30th, 1908, Crovo and Crenshaw, by leave of Court, amended their declaration and alleged that the Telegraph Company failed to transmit said message as promptly as practicable and in the order of delivery and that said negligence occurred within the State of Virginia, to which the Telegraph Company again demurred. On May 6th, 1908, Crovo and Crenshaw, in lieu of previous declarations, filed a new declaration styled, "An Amended Declaration" containing two counts, (manuscript record, pp. 12-13.)

2 The first count of this declaration alleged a failure to transmit said message as promptly as practicable and that said negligence occurred within the State of Virginia, and the second count alleged a failure to transmit said message in the order of delivery, and that said negligence was committed within the State of Virginia.

To this declaration, and each count thereof, the Telegraph Company demurred upon grounds which will be later discussed. The Court overruled the demurrer as to the first count and sustained the demurrer as to the second count of said declaration. The plaintiffs' declaration was, therefore, trimmed down to the first count thereof, (manuscript record, p. 12). The Telegraph Company pleaded "*Nil Debet*"; and filed a special plea in which it said that it had neither "done any act nor omitted any duty for which the penalty described by the Virginia Statute can be imposed, because the Virginia Statute, under which the plaintiff claims the right to recover in this action is, as applied to the message mentioned in the plain-

tiffs' declaration and to the plaintiffs' alleged cause of action, repugnant to Article I, Section VIII, of the Constitution of the United States, and therefore, null and void."

To maintain their cause of action, Crovo and Crenshaw introduced a single witness, W. C. Crenshaw, a member of said firm, who testified that on September 25th, 1907, at about 9:30 A. M., he filed with the Telegraph Company at its office in the City of Richmond, Virginia, for transmission to Brockton, in the State of New York, a message dated September 25th, 1907, reading as follows:

S. P. Morse & Son, Brockton, New York:

Ship at once car Black Grapes also some Niagra and Delaware if can answer at once.

(Signed) CROVO & CRENSHAW.

3 that he next heard of said message at about 5:30 P. M. on the afternoon of September 25th, 1907, when he received from the Telegraph Company's office in the City of Richmond, Virginia, a written notice (manuscript, p. 15) caption and signature omitted, reading:

"Your dispatch dated to-day to S. P. Morse & Son, Brooklyn, New York, is undelivered. Reason: Unable to locate party. Give better address."

that he 'phoned said office about said message and was told that they would look into the matter; "that he knew nothing as to when said message left the City of Richmond in the State of Virginia or where the delay in its transmission occurred or whether the delay occurred in the City of Richmond, Virginia, or in the City of New York in the State of New York."

The Telegraph Company introduced two witnesses, A. C. Stephenson, the manager of its Richmond, Virginia office, and R. C. Thompson, the Traffic Chief in charge on September 25th, 1907, of its telegraph office in the City of Richmond, Virginia, for the transmission of telegraphic dispatches.

Mr. Stephenson testified that the above notice to Crovo & Crenshaw was sent from the Telegraph Company's office in the City of Richmond, Virginia, of which he was manager; that he received a service message from the City of Brooklyn, N. Y. showing that the message involved in this suit was transmitted by the Telegraph Company to the City of Brooklyn, N. Y. and was undelivered in the City of Brooklyn, N. Y. and that said notice notified Crovo & Crenshaw of that fact and asked them for a better address; that said notice in the usual and ordinary course of business meant that

4 said message was sent from Richmond, Virginia, to Brooklyn, N. Y. and not to Brockton, N. Y.

Both Mr. Stephenson and the witness R. C. Thompson testified that on September 25th, 1907, there was no direct wire for the transmission of messages from the City of Richmond in the State of Virginia to either Brooklyn in the State of New York or to Brockton in the State of New York; that the usual and proper route and rout-

ing and the one then used by the Telegraph Company for the transmission of messages by the Telegraph Company from its office in the City of Richmond in the State of Virginia to either Brooklyn, N. Y., or Brockton, N. Y., was for the message to be transmitted on a through wire from its office in the City of Richmond in the State of Virginia to its office in the City of New York in the State of New York and at the last named point taken from the wire of the defendant and written out and relayed and retransmitted from its said office in the City of New York in the State of New York to the point of address whether Brooklyn, N. Y., or Brockton, N. Y., that in the transmission of a message from New York City, N. Y. to Brockton, N. Y. the message would have to be again relayed in the City of Buffalo, N. Y. in the manner above described for relaying messages; that in the transmission of a message from the Telegraph Company' said office in the City of Richmond, Va. to New York City in the State of New York as above described, such transmission is instantaneous; that is to say, when such message leaves the office of the Telegraph Company in the City of Richmond, Virginia; it instantaneously reaches the office of the Telegraph Company in the City of New York in the State of New York.

This being all of the evidence introduced by the plaintiff and the defendant, the Telegraph Company demurred to the evidence on the following grounds: (manuscript, pp. 19-21).

"1. There is no proof that the delay complained of occurred in the State of Virginia, and proof of that fact is necessary to sustain this action:

2. There is no proof that the delay complained of occurred in the State of Virginia and without such proof the Virginia Penalty Statute, upon which the plaintiffs rely, is, as applied to the plaintiffs' cause of action, in contravention of and repugnant to Article I, Section VIII of the Constitution of the United States, and, therefore, null and void.

2. *a*. There is no proof that the delay complained of occurred in the State of Virginia and without such proof the Virginia Penalty Statute upon which the plaintiffs rely, is, as applied to the plaintiffs' cause of action, in contravention of and repugnant to Amendment XIV of the Constitution of the United States in that it gives said Penalty Statute extra-territorial effect and treats said statute as having vitality and force outside of the territorial limits of the Commonwealth of Virginia and treats said statute as giving the plaintiff a right to recover in this action for an alleged default or an alleged neglect of duty on the part of the defendant which did not occur within the territorial limits of the Commonwealth of Virginia and because the said Penalty Statute as construed and applied by the Court (*a*) abridges the privileges or immunities of the defendant; (*b*) deprives the defendant of its property without due process of law; (*c*) and denies to the defendant the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States; and because said Statute as construed and applied by the Court in this action deprives the defendant of its property without due process of law and takes from the defendant its property without just or adequate compensation in violation of Ar-

ticle V of the Constitution of the United States—and for the
6 reasons aforesaid the said Penalty Statute is null and void as applied to the plaintiffs' cause of action.

3. Because the Virginia Penalty Statute, under which the plaintiffs seek to recover in this action, does not apply to or regulate a message filed with the defendant to be transmitted from Richmond, in the State of Virginia, to Brockton, in the State of New York, and if so construed or applied by this court, is null and void, because repugnant to Article I Section VIII of the Constitution of the United States.

4. Because the Virginia Penalty Statute, under which the plaintiffs seeks to recover in this action, does not and cannot apply to or regulate that part of the transmission outside of the State of Virginia of the message mentioned in the plaintiffs' declaration, and without evidence showing that a default occurred in the State of Virginia, no judgment against the defendant in this action can be sustained.

5. Because if the delay complained of occurred in the City of New York, in the State of New York, or at any other point in the State of New York, or at any point out-side of the State of Virginia, the Statute of Virginia upon which the plaintiffs rely, to sustain their action, neither has nor can have any lawful application; and if said statute be construed to apply outside of Virginia, the said Statute is repugnant to Article 1 Section VIII of the Constitution of the United States, and is, therefore, null and void.

6. Because the Penalty Statute of Virginia upon which the plaintiffs rely is, as construed and applied by the Court to this action, an attempt to regulate interstate commerce in violation of Article I Section VIII of the Constitution of the United States and said Statute as applied by the Court to this action is, therefore, null and void."

The jury found a verdict in favor of Crovo and Crenshaw
7 for one hundred dollars, ($100.00); and the Court overruled the Telegraph Company's demurrer, and on May 6, 1908, gave judgment in favor of Crovo and Crenshaw against the Telegraph Company for the statutory penalty of one hundred dollars, ($100.00) with interest from May 6th, 1908, and costs.

Assignment of Errors.

First. The Trial Court erred in overruling the Telegraph Company's demurrer to the first count of the amended declaration filed by Crovo and Crenshaw on May 6th, 1908.

It should have sustained said demurrer, on each of the grounds stated therein, and dismissed the action.

Second. The Trial Court erred in disregarding the special plea filed by the Telegraph Company.

It should have sustained said special plea, and held that the Virginia Statute under which Crovo and Crenshaw claimed the right to recover in this action is, as applied to the message mentioned in the declaration and to the alleged cause of action, repugnant to

Article I, Section VIII, of the Constitution of the United States, and therefore, null and void.

Third. The Trial Court erred in overruling the demurrer of the Telegraph Company to the evidence, as particularly set out in the record; (manuscript, pp. 19-21).

It should have sustained said demurrer to the evidence on each, every and all of the grounds stated in said demurrer, which are here reff/r-ed to as if set out at full length, and should have dismissed the said action.

The Virginia Statute, upon which Crovo and Crenshaw relied, reads as follows:

8 "It shall — the duty of every telegraph company doing business in this State to receive and transmit dispatches from and for other telegraph or telephone companies or lines, and from and for any person, upon the payment of the usual charges therefor, if such payment is demanded; to transmit the same faithfully, impartially, with substantial accuracy, as promptly as practicable, and in the order of delivery to the said company. For every failure to transmit a dispatch and for every failure to transmit a dispatch faithfully, impartially, with substantial accuracy, and for every failure to transmit a dispatch as promptly as practicable, or in the order of its delivery to the company, the company shall forfeit the sum of one hundred dollars to the person sending or offering to send such dispatch, or to the person to whom it was addressed: Provided, however, that not more than one recovery shall be had on one dispatch, and the recovery by one party entitled thereto shall be a bar to the recovery of the other party. But nothing herein shall prevent any such company from giving preference to dispatches on official business from or to officers of the Unites — or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers for the transmission to them for publication of intelligence of general and public interest out of its regular order."

Argument.

Upon comparing Crovo and Crenshaw's declaration with the Virginia Statute, it will be seen that they do not allege a failure on the part of the Telegraph Company, (*a*) to transmit said message, (*b*) or to transmit said message faithfully, (*c*) or to transmit

9 said message impartially, (*d*) or to transmit said message with substantial accuracy, (*e*) or to transmit said message in the order of its delivery to the Telegraph Company.

They are confined in the declaration upon which they went to trial to an allegation, "that said defendant did not and neglectfully failed to transmit the said message as promptly as practicable; which negligence occurred within the State of Virginia, whereby and by virtue of the statute in such cases made and provided an action hath accrued to the said plaintiffs to have and demand of the said defendant the sum of one hundred dollars."

The Telegraph Company in its demurrer to said declaration denied in varied form the constitutionality of the Virginia Statute upon

which Crovo and Crenshaw relied as applied to the message described in their declaration and their alleged cause of action, and insisted that said Statute, under which Crovo and Crenshaw claimed the right to recover in this action, is, (*a*) as applied to the message mentioned in their declaration, and (*b*) their alleged cause of action—repugnant to Article I Section VIII of the Constitution of the United States, and therefore, null and void. The Telegraph Company's special plea raises and presents the same Federal question. And the Telegraph Company's demurrer to the evidence raises, elaborates and presents the same Federal question; also submits that said Virginia Statute is, as applied to Crovo and Crenshaw's cause of action, repugnant to Amendment XIV of the Constitution of the United States and Article V of the Constitution of the United States, and is therefore, null and void, as applied to said cause of action; and said demurrer to evidence also submits and insists that there is no proof in the record that the delay complained of occurred with- the State of Virginia.

10 W. C. Crenshaw, a member of the firm of Crovo and Crenshaw, and the only witness introduced in their behalf, testified, "that he knew nothing as to when said message left the City of Richmond in the State of Virginia or where the delay in its transmission occurred or whether the delay occurred in the City of Richmond, Virginia, or in the City of New York in the State of New York." The record shows that the Telegraph Company has no through wire to either Brockton, New York, or Brooklyn, New York; that every message filed at Richmond Virginia for transmission to Brockton, New York or Brooklyn, New York, must be transmitted over a direct wire from the Telegraph Company's office in Richmond, Virginia, to the Telegraph Company's office in the City of New York, New York; that upon its arrival at the last named office, it must be taken from the telegraph wire and written out and relayed and retransmitted to the point of address whether Brooklyn, New York, or Brockton, New York. It further shows that the transmission of a message over a through wire from the Telegraph Company's office in the City of Richmond, Virginia to its office in the City of New York, is instantaneous, that is to say, when such message leaves the office of the Telegraph Company at Richmond, Virginia, it instantaneously reaches its office in New York City.

Nothing in the record shows a moment's delay on the part of the Telegraph Company to transmit said message from its office in the City of Richmond to its office in the City of New York. So far as the record shows, said message may have been transmitted from said Richmond office to said New York office instantaneously upon its receipt by the Telegraph Company.

Nothing in the record shows the point at which or the State in which the word Brockton was changed to the word Brooklyn. So far as the record shows, the change may have been made, (*a*) in the City of New York by the operator who took the message from the

11 Richmond wire and wrote it out for retransmission, or (*b*) in the City of New York by the telegraph operator who relayed and resent and retransmitted said message to Brooklyn, New

York instead of Brockton, N. Y. The burden was not upon the Telegraph Company to show that the change of name occurred in the City of New York. On the contrary, Crovo and Crenshaw claimed a statutory penalty and fine against the Telegraph Company, and the burden was upon them to make good their allegation—to prove their case. They alleged no damages, and so far as the record shows, they suffered no damages. They claim the penalty—the pound of flesh, where they had proved no loss. The Telegraph Company had the right to stand and rely upon the fact that Crovo and Crenshaw had failed to prove their case. Crovo and Crenshaw did not call as their witness (*a*) the Telegraph Company's operator in the City of Richmond who transmitted said message to the City of New York, (*b*) nor the Telegraph Company's operator in the City of New York who took said message from the Richmond wire, (*c*) nor the Telegraph Company's operator in the City of New York who retransmitted said message from the City of New York to the City of Brooklyn. As stated above, their proof utterly fails to establish the point or the State at or in which the word Brockton was changed to Brooklyn.

Furthermore, the declaration alleged a failure to transmit the message as promptly as practicable and alleged that said failure occurred within the State of Virginia. It is submitted that the declaration in effect alleged that said message was actually transmitted from the City of Richmond, and that such transmission was not as prompt as practicable. It did not allege a failure to transmit said message faithfully or impartially or with substantial accuracy or in the order of its delivery. Its allegations were under none of these provisions of the Statute, it confined itself to allegations, (*a*) that the
12 Telegraph Company failed to transmit said message as promptly as practicable, and (*b*) that such failure was in the State of Virginia. Its allegations and proof did not correspond. Its allegations were directed to one provision of the penalty statute and its proof was directed to a different provision of the penalty statute. It seems to be clear that Crovo and Crenshaw have absolutely failed, even upon the theory of their own declaration, to prove their case.

While this discussion has been directed to Crovo and Crenshaw's theory, enunciated in their declaration, that the Virginia statute authorizes a recovery for a failure to transmit an interstate message as promptly as practicable from a point in the State of Virginia to a point in the State of New York, if the negligence occurs within the State of Virginia—that contention is wholly denied by the Telegraph Company and, while denying that there was any negligence or failure to discharge its statutory duty in the State of Virginia, its position is that there can be no recovery by the plaintiffs either upon (*a*) the case stated in their declaration or (*b*) the evidence before the Court. The Virginia statute, as construed and applied by the trial court (*a*) to the message described in the declaration and (*b*) to the plaintiffs' cause of action, is repugnant to Article 1, Section VIII of the Constitution of the United States in that it undertakes to regulate commerce among the several States within the meaning and intent of the Constitution of the United States.

The Telegraph Company is engaged in the business of receiving and transmitting telegraphic dispatches. It has offices in the States of Virginia and New York and throughout the Union. It has through wires, *i. e.* continuous and unbroken wires from the City of Richmond, Virginia, to the City of New York, passing through the States of Maryland, Pennsylvania, Delaware and New Jersey. All telegraphic dispatches filed with the Telegraph Company in the City of Richmond, Virginia, to Brockton, New York or Brooklyn,
13 New York, must be transmitted from Richmond, Virginia, to the City of New York over such continuous and unbroken wires, and there taken from the wire, written out and retransmitted to the point of destination. The transmission from Richmond, Virginia, to New York City is instantaneous, *i. e.*, the dots, dashes, signals etc. made at Richmond office are instantaneously reproduced in the New York City office, and not only will a part of a message have been written out in the City of New York before the whole of the message has left the City of Richmond, Virginia, but a part of a word in a message will have been written out in the City of New York before the entire word has left the Richmond, Virginia, office; and to be even more exact, some of the dots, dashes and signals indicating a single letter in such message will have actually reached the New York City office before the remaining dots, dashes and signals completing that letter have actually left the Richmond, Virginia, office.

The Constitution of the United States provides as follows:

ARTICLE I, SECTION VIII.

1. The Congress shall have power .....
.....

3. To regulate commerce with foreign nations and among the several states and with the Indian tribes.....

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof."

14 The regulating power of Congress applied to the message, in the case at bar, when it was filed with the Telegraph Company for transmission to a point in the State of New York, and accompanied that message throughout its journey. The business of the Telegraph Company in handling and transmitting said message was commerce. The Telegraph Company was an instrument of commerce. Its Transmission of said message was commerce itself. Congress only has power to regulate the transmission of interstate dispatches. Congress only has power to prescribe the rules by which that commerce shall be gover-ed—that is, the conditions upon which it shall be conducted; to determine when it shall be free from penalties and when subject to exactions. This power embraces within its control all of the lines, links, means, instrumentalities and agencies by which that commerce is encouraged, aided or conducted; and those who are engaged in interstate commerce have a right to rely

upon the power of Congress to protect against any interference on the part of the States by penalties or otherwise.

What is interstate commerce and when does it comes within the regulating power of Congress? This question has been discussed and answered by the Supreme Court of the United States in a great number of cases, from a few of which extracts will be made.

In McCall *v.* California, 136 U. S. 104, Mr. Justice Lamar in delivering the opinion of the Court, p. 108, said:

"In County of Mobile *v.* Kimball, 102 U. S. 691, 702, this court defined interstate commerce in the following language: 'Commerce with foreign countries and among the states, strictly considered, consists of intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property as well as the purchase, sale and exchange of commodities.'

"Pomeroy in his work on 'Constitutional Law section 378, referring to the signification of the word 'Commerce' says: 'It
15 includes the *fact of intercourse and of traffic* and the subject matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the *means, instruments* and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons. All these may, therefore, be regulated.'"

In re Debs, 158 U. S. 564, Mr. Justice Brewer, in delivering the opinion of the Court, at p. 599, said:

"We have given to this case the most careful and anxious attention, for we realize that it touches closely questions of supreme importance to the people of this country. Summing up our conclusions, we hold that the Government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the National Government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions from highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail. * * *"

In Brown *v.* Houston, 114 U. S. 622, the court at p. 630, said:

"* * * All laws and regulations are restrictive of natural freedom to some extent, and when no regulation is imposed by the Government which has the exclusive power to regulate, it is
16 an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that that commerce shall be free and untrammelled; and any regulation of the subject by the States is repugnant to such freedom. This has frequently been laid down as law in the judgments of this Court. In

Welton *v.* State of Missouri, 91 U. S. 282, Mr. Justice Field, speaking for the Court, said: 'The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislations with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled.' * * *"

In Robins *v.* Shelby County Taxing District, 120 U. S. 489, Mr. Justice Bradley, in delivering the opinion of the court, at page 492-494, said:

"1. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character or admit only of one uniform system, or plan of regulation. * * *"

"2. Another established doctrine of this Court is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereinafter mentioned, is repugnant to such freedom. * * *"

In Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196,
17 Mr. Justice Field, in delivering the unanimous opinion of the Court at pp. 203-4, said:

"As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation.

"It matters not that the transportation is made in ferry boats, which pass between the States every hour of the day. The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which

are local and limited in their nature or sphere of operation,
18 the States may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character and require uniformity of regulation, affecting alike all the states, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation. Otherwise, there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products, and against those of other States. It was from apprehension of such conflicting and discriminating State legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the States was vested in Congress——"

The regulating power of Congress applies to an interstate message when it is filed for transmission, regulates its transmission within the limits of the State in which it is filed and accompanies it through every stage of its journey until it reaches its destination.

On this point the Daniel Ball, 10 Wall. 557, 565, is a *leading authority*. In that case the steamer Daniel Ball was engaged in transporting goods on Grand River, wholly within the State of Michigan, some of which were destined for other States and some of which were brought from other States destined for places in the State of
19 Michigan; but this vessel did not run in connection with or in continuation of any line of vessels or Railway leading to other States; and the contention was, that she was not engaged in interstate commerce, but the Supreme Court of the United States held otherwise.

In delivering the opinion of the Court, Mr. Justice Field said: * * * "So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce: for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation it is subject to the regulation of Congress."

In Wabash, etc. Ry. Co. *v.* Illinois, 118 U. S. 557, The fifth paragraph of the syllabus is as follows:

"(5) Notwithstanding what is there said, this Court holds now, and has never consciously held otherwise, that a Statute of a State, intended to regulate or to tax or to impose any other restriction upon

the transmission of persons or property or telegraphic messages from one State to another, is not within that class of legislation which the State may enact in the absence of legislation by Congress; and that such Statutes are void even as to that part of such transmission which may be within the State."

The language of the opinion is strikingly apposite. Mr.
20 Justice Miller in speaking for the Court said: (pp. 572-573).

"It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the States might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the States and with foreign nations, as this Court has said before, was among the most important of the subjects which prompted the formation of the Constitution. (Cook *v.* Pennsylvania, 97 U. S. 566, 574; Brown *v.* Maryland, 12 Wheat. 419, 446.) And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

Telegraph Companies occupy the same relation to commerce as carriers of messages that Railroad Companies do as carriers of goods. Both are instruments of commerce and their business is commerce itself.

In Pensacola Telegraph Co. *v.* Western Union Telegraph Co. 96 U. S. 1, the Court said:

"Since the case of Gibbons *v.* Ogden (9 Wheat 1) it has never been doubted that commercial intercourse is an element of commerce, which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed
21 within the power of Congress, because being national in their operation they should be under the protecting power of their Government."

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steam-boat, from the coach and steam-boat to the railway, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times, and under all circumstances. As they were intrusted to the General Government for the good of the Nation, it is not only the right, but the duty of Congress to see to it that intercourse among

the States and the transmission of intelligence are not obstructed or unnecessarily incumbered by State Legislation."

In Western Union Telegraph Company *v.* Pendleton, 122 U. S., 347, the Court at p. 356 said:

"The contention of the Western Union Telegraph Company is that the law of Indiana is in conflict with the clause of the Constitution vesting in Congress the power to regulate commerce among the States.

"In Telegraph Co. *v.* Texas, 105 U. S., 460, 464, it was decided by this Court that intercourse by the telegraph between the States is interstate commerce. Its language was: 'A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both com-
22 panies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits.'

"Although intercourse by telegraph messages between the States is thus held to be interstate commerce, it differs in material particulars from that portion of commerce with foreign countries and between the States which consist in the carriage of persons and the transportation and exchange of commodities, upon which we have been so often called to pass. It differs not only in the subjects which it transmits, but in the means of transmission, other commerce deals only with persons or with visable and tangible things. But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence. Other commerce requires the constant attention and supervision of the carrier for the safety of persons and property carried. *The message of the telegraph passes at once beyond the control of the sender and reaches the office to which it is sent instantaneously. It is plain, from these essentially different characteristics, that the regulations suitable for one of these kinds of commerce would be entirely inapplicable to the other.*" (Italic not in text.)

The Virginia Statute upon which Crovo and Crenshaw rely attempts to regulate interstate commerce, and is, therefore, repugnant to Article I Section VIII of the Constitution of the United States.

To bring the transmission of a telegraph dispatch within the control of a state, as a part of its domestic commerce, the dispatch transmitted must be *within the entire voyage* under the exclusive jurisdiction of the State; and the Statute of Virginia imposing a forfeiture upon a telegraph company for a failure to transmit a dispatch as promptly as practicable, as applied to a dispatch to
23 be transmitted from a point in the State of Virginia to a point in the State of New York, passing through several other States, is an attempt to regulate interstate commerce, and is, therefore repugnant to Article I Section VIII of the Constitution of the United States vesting in Congress exclusive power to regulate commerce with foreign nations and among the several States and with the Indian tribes.

The transmission of a telegraphic dispatch from an office in the State of Virginia at which it is filed to the point in the State of New York to which it is addressed is one voyage. It includes receiving and transmitting the dispatch. The receipt of the message is a necessary incident to, indeed is a part of its transmission. Without it the transmission would be impossible. Transmission implies both the taking up of the message at some point *ant* and its transmission to some other point. The two together contitute the means of intercommunication; the two together are inseparable parts of the same act; the two together constitute the act of interstate commerce.

In Pacific Coast Steam-ship Co. *v.* Board of Railroad Com'rs. 18 Federal 10, decided by the Circuit Court of the United States for California on September 17th, 1883 with Mr. Justice Field and Circuit Judge Sawyer, sitting, the syllabus is as follows:

"Interstate Commerce—Power of the State to Regulate."

"The state board of railroad commissioners has no power to regulate or interfere with the transportation of persons or merchandise, by a steam-ship company, between ports within the state, if they be in transit to or from other states, or when in nagigating the ocean the vessel goes beyond a marine league from the Shore. This power has been conferred upon congress, and is exclusive." In delivering the opinion of the Court, Mr. Justice Field said, p. 13:

24 "Nor are vessels engaged in purely domestic commerce when their voyages between ports of the same state require them to navigate the ocean. When they go beyond the marine league they pass out of the jurisdiction of the state, and come under the exclusive control of congress. To bring the transportation within the control of the state, as a part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state. Lord *v.* Steam-ship Co. 102 U. S. 541."

"If the steam-ships of the plaintiff carried any persons or merchandise between the ports of the state, not going out, on their voyage between these ports, of the jurisdiction of the state, and the persons or merchandise carried not coming from any other state or a foreign country, or going to another state or country, the transportation commencing and ending in the state, then to that extent they would be engaged in commerce purely domestic, and to that extent the railroad commissioners might have jurisdiction to regulate the fares and freights for transportation on the vessels. But it is conceded by the pleadings that in every voyage made by the vessels between ports of the state,—that is between San Francisco and such ports along the coast,—they pass out upon the ocean beyond a marine league from the shore. They are, therefore, engaged in no transportation which the commissioners can regulate."

In the case of Henderson *v.* Mayor of New York, 92 U. S. 259, 275, Mr. Justice Miller in delivering the opinion of the court, said:

"The transportation of a passenger from Liverpool to the City of New York is one voyage. It is not completed until the passenger

is disembarked at the pier in the latter city. A law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone a vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations."

In Hanley *v.* Kansas City Southern Railway Company, 197 U. S. 617, the syllabus is as follows:

"The transportation of goods on a through bill of lading from Fort Smith, Arkansas, to Grannis, Kansas, over respondent's railroad by way of Spiro in the Indian Territory, a total distance of one hundred and sixteen miles, of which fifty-two miles is in Arkansas and sixty-four in the Indian Territory, is interstate commerce, and is under the regulation of Congress, free from interference by the State of Arkansas; a railway company operating such a line can maintain an action for equitable relief restraining the state railroad commissioners from fixing and enforcing rates between points within the state, when the transportation is partly without the State and under the conditions above stated.

"Lehigh Valley Railroad Co. *v.* Pennsylvania, 145 U. S. 192, distinguished as applying to taxation of freight received on merchandise transported from one point to another within the same State by a route partly through another State and not to the *regulation* of such jurisdiction."

Mr. Justice Holmes in delivering the unanimous opinion of the Court, pp. 620, 621, said:

"It is decided that navigation on the high seas between ports of the same State is subject to regulation by Congress, Lord *v.* Steamship Co. 102 U. S. 541, and is not subject to regulation by the State, Pacific Coast Steamship Co. *v.* Railroad Commissioners, 9 Sawyer 253, and although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last cited case disposes equally of the case at bar. 'To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State.' 9 Sawyer, 258. Decisions in point are State *v.* Chicago, St. Paul, Minneapolis & Omaha Railway Co., 40 Minnesota, 267; Sternberger *v.* Cape Fear & Yadkin Valley Railroad Co., 29 So. Car. 510. See also Milk Producers' Protective Association *v.* Delaware, Lackawanna & Western Railroad Co., 7 Interstate Commerce Rep. 92, 160, 161."

* * * * * * *

"We are of opinion that the language which we have quoted from Mr. Justice Field is correct, and that the decree of the Circuit Court should be confirmed."

The transmission of the message, in the case at bar, required concurrent action in the States of Virginia and New York as well as favorable conditions in the States of Maryland, Delaware, Pennsylvania and New Jersey. The sending operator in Richmond, the receiving operator in New York City, the offices and instruments in each of said cities, and the through wire beginning in the State of

Virginia, passing through the four intervening States, and ending in the City of New York, were each and all instrumentalities of interstate commerce in the transmission of the dispatch upon which this suit is predicated. All of these instrumentalities were brought into play; and the coöperative action by which the act of interstate commerce, the transmission of the message—was effected, was concurrent. All efforts of the Richmond operator to send the message would have been futile without the concurrent and active coöperation on the part of the operator in New York City.

The sounds representing the dots, dashes and signals made by a Richmond operator in placing a message upon a through wire, are instantly reproduced in the City of New York, if all conditi-
27 tions are favorable at that point and in each of the State-through which the message passes in making its journey; but atmospheric or other unfavorable conditions or causes too varied and numerous to detail in any State through which the direct wire passes may render such reproduction impossible or imperfect; and it is impossible to distinguish between that part of the transmission within the State of Virginia and that part of the transmission through intervening States and the State of New York. The message makes but one voyage in its journey from Richmond, Virginia, to New York City.

Virginia has no greater authority to regulate the transmission of a message having its origin in Virginia and destination in New York than the several States through which the message passes. If Virginia may regulate such transmission within her borders, then Maryland may prescribe rules for its transmission within her limits; Pennsylvania may do the same; and Delaware and New Jersey would have equal power within their respective limits.

No one of said States may exercise such power. The Supreme Court of the United States has so declared in striking language. For example, the Court in the Wabash Case, 182 U. S., 572, said:

"It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the States might choose to impose upon it, that the commerce clause was intended to secure."

Amendment XIV to the Constitution of the United States.

The penalty statute upon which Crovo and Crenshaw rely, as construed by the Trial Court, is, as applied to their cause of action, in contravention of and repugnant to Amendment XIV to the Constitution of the United States in that it undertakes to deprive the
28 Telegraph Company of rights guaranteed to it by the Constitution of the United States and the Amendments thereto and (*a*) abridges the privileges or immunities of the Telegraph Company; (*b*) deprives it of its property without due process of law and without compensation; and (*c*) denies to it equal protection of the laws, and said statute is, for this reason also, null and void.

For the foregoing, and other reasons appearing upon the face of the record, the Telegraph Company prays that a writ of error and

supersedeas to the aforesaid judgment of the Law and Equity Court of the City of Richmond may be awarded to it and that said judgment may be reversed and annulled.

THE WESTERN UNION TELEGRAPH COMPANY,
By A. L. HOLLADAY, *Its Counsel.*

I, the undersigned, Addison L. Holladay, Counsel practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion the judgment of the Law and Equity Court of the City of Richmond rendered on May 6th, 1908, complained of in the foregoing petition, should be reviewed and reversed by the Supreme Court of Appeals of Virginia.

A. L. HOLLADAY.

Petition & record rec'd. July 9, 1908.

Refused: R. H. C.

S. G. W.
G. M. H.
J. A. B.

29 VIRGINIA:

Pleas before the Honorable John H. Ingram, Judge of the Law and Equity Court of the City of Richmond, held for the said City at the Court-room thereof in the City Hall, on May 8th, 1908.

Be it remembered that heretofore, to-wit: At Rules held in the Clerk's Office of the said Law and Equity Court on the Third Monday in January, 1908: Came L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, by counsel, and filed their declaration against the Western Union Telegraph Company, which Declaration is in the words and figures following to-wit:

In the Law and Equity Court of the City of Richmond.

L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, Plaintiffs, Complain of The Western Union Telegraph Company, a non-resident corporation doing business in this State, defendant.

Which said defendant is doing the business of receiving and transmitting messages for compensation, in this state, of a plea that it *rendered* unto the said plaintiff the sum of one hundred dollars, which to him the said defendant owes and from him unjustly detains, for this to-wit: that heretofore to-wit: on the 25th day of September, 1907, the said plaintiff at Richmond in the state of Virginia delivered to the said defendant company, doing business by its agents in said City, during business hours, a message addressed to S. P. Morse & Son, Brockton, N. Y., in the following words and figures, to-wit:

30

Pd. 9-25-7.

"S. P. Morse & Son, Brockton, N. Y.:

Ship at once car Black Grapes also some Niagra and Delaware if can answer at once.

CROVO & CRENSHAW."

Which said message or dispatch was then and there delivered to the said company in the morning hours, between the hours of 9 and 10 o'clock, and the said message was then and there received by the said defendant company, and the established charges were prepaid for the faithful and impartial transmission of the said message and as promptly as practicable in the order of delivery, and the said plaintiff avers that the said defendant did not transmit the said message faithfully and impartially, and as promptly as practicable and in the order of delivery; and in fact that the said defendant had not transmitted said message at the hour of 5 o'clock in the afternoon of the same day, and plaintiff is not advised that said message was ever transmitted or delivered to sendee: Whereby and by virtue of the statute in such cases made and provided an action hath accrued to the said plaintiffs to have and demand of the said defendant the sum of one hundred dollars.

Yet the said defendant, although often requested has not as yet paid to the said plaintiff the sum of $100.00 above demanded, or any part thereof, but the same to pay hath hitherto failed and refused and still doth fail and refuse, to the damage of the said plaintiff in the sum of One Hundred Dollars. And therefore he brings his suit.

J. KENT RAWLEY, *p. q.*

31 Whereupon the defendant being summoned appeared by counsel and filed its plea in abatement, demurrer, and plea of "nil debet," which are in the following words and figures to-wit:

(*Plea in Abatement Filed Second January Rules,* 1908.)

In the Law and Equity Court of the City of Richmond.

L. J. CROVO and W. C. CRENSHAW, Partners Trading as Crovo & Crenshaw, Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

The defendant, the Western Union Telegraph Company, by its attorney, comes and says that this court ought not to have take or maintain any further cognizance of the action aforesaid of the said plaintiffs, because the said defendant says that the supposed cause of the said action did not, nor did any part thereof, arise in the city of Richmond, Virginia, but that the supposed cause of the said action, if any, and every part thereof, arose in the city of New

York in the State of New York; and that at the time of the issuing of the writ in this action the said defendant did not reside, nor was its principal office, nor did its mayor, rector, president or other chief officer reside in the city of Richmond, Virginia, but that the said defendant resided, its principal office was, and its president and chief officer resided in the city of New York in the state of New York. And this the said defendant is ready to verify.

Wherefore it prays judgment whether this court can or will take any further cognizance of the action aforesaid.

A. L. HOLLADAY, *p. d.*

STATE OF VIRGINIA,
City of Richmond, To-wit:

I, Julia S. Jennings, a Notary Public in and for the city
32 of Richmond, in the state of Virginia, do hereby certify that L. J. Maxwell, Superintendent of The Western Union Telegraph Company for the First District, Southern Division, in which territory the City of Richmond, Virginia, is located, this day personally appeared before me in my said city and made oath that the statements contained in the foregoing plea are true to the best of his knowledge, information and belief.

Given under my hand this the 20th day of January, 1908.

JULIA S. JENNINGS,
Notary Public.

My commission expires April 30, 1908.

(*Demurrer Filed 2nd January Rules*, 1908.)

In the Law and Equity Court of the City of Richmond.

L. J. CROVO and W. C. CRENSHAW, Partners Trading as Crovo & Crenshaw, Plaintiffs,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

The defendant, the Western Union Telegraph Company, demurs to the declaration filed by the plaintiff in the above entitled action, and to each count thereof, and for cause of demurrer saith, that the same is not sufficient in law.

A. L. HOLLADAY, *p. d.*

(*Plea of "Nil Debet," Filed 2nd January Rules,* 1908.)

In the Law and Equity Court of the City of Richmond.

L. J. CROVO and W. C. CRENSHAW, Partners Trading as Crovo & Crenshaw, Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

33 And the said defendant, by its attorney, comes and says that it does not owe the said sum of One Hundred Dollars ($100.00) in the said declaration above demanded, nor any part thereof, in manner and form as the said plaintiff hath above thereof complained against it. And of this the said defendant puts itself upon the country.

A. L. HOLLADAY, *p. d.*

And at another day to-wit: (In Court), April 30th, 1908.

This day came again the parties by counsel and the defendant by its attorneys filed the grounds of its demurrer to the plaintiffs' declaration. The defendant then filed a special plea in writing to which the plaintiffs replied generally. And thereupon the plaintiffs by consent of Court amended their declaration, and by consent the demurrer to the declaration in this case is considered as being filed to the declaration as amended. And the said demurrer being argued time is taken to consider thereof.

(*Grounds of Demurrer Filed April 30th,* 1908.)

In the Law and Equity Court of the City of Richmond.

CROVO AND CRENSHAW, Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

The defendant, The Western Union Telegraph Company, demurs to the declaration filed by the plaintiffs in the above entitled action, and for cause of demurrer saith that the same is not sufficient in law, because:

1. The said declaration does not show the plaintiffs' alleged cause of action with sufficient clearness and precision to apprise the defendant (*a*) of the grounds of the plaintiffs claims, or (*b*)
34 the particular acts of negligence of which the plaintiffs complain, or (*c*) to enable the defendant to prepare and make its defense.

2. The declaration does not show the alleged cause of action with that clearness and precision required by the rules of pleading.

3. The said declaration does not show the cause of action relied upon by the plaintiffs.

4. The said declaration does not designate the negligent act complained of as the grounds for the recovery in this action.

5. The said declaration does not allege that the defendant has either done any act, or omitted any duty, for which the Virginia Statute imposes a penalty.

6. The Virginia Statute, under which the plaintiffs claim the right to recover a penalty in this action, is repugnant to Article 1, Section VIII of The Constitution of the United States, as applied to the message mentioned in the plaintiffs' declaration and to the plaintiffs' alleged cause of action—and is, therefore, null and void as applied to said message and this action.

7. The penalty prescribed by the Virginia Statute cannot be recovered by the plaintiffs in this action because the Virginia Statute, under which the plaintiffs claim the right to recover in this action, is, as applied to the message mentioned in the plaintiffs' declaration and to the plaintiffs' alleged cause of action, repugnant to Article I, Section VIII, of the Constitution of the United States and, therefore, null and void.

8. The penalty prescribed by the Virginia Statute cannot be recovered by the plaintiffs in this action because the Virginia Statute, under which the plaintiffs claim the right to recover in this action, is, as applied to the message mentioned in the plaintiffs declaration, repugnant to Article I, Section VIII of the Constitution of the United States and, therefore, null and void.

35 9. The penalty prescribed by the Virginia Statute cannot be recovered by the plaintiffs in this action because the Virginia Statute, under which the plaintiffs claim the right to recover in this action, is, as applied to the plaintiffs alleged cause of action, repugnant to Article I, Section VIII of the Constitution of the United States and, therefore, null and void.

A. L. HOLLADAY, *p. d.*

(*Special Plea. Filed April 30th*, 1908.)

In the Law and Equity Court of the City of Richmond.

CROBO AND CRENSHAW, Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

The defendant, The Western Union Telegraph Company, by its attorney, comes and says that the said plaintiffs ought not to have or maintain the above entitled action against it because the said defendant says that it has neither done any act, nor omitted any duty, for which the penalty prescribed by the Virginia Statute can be imposed, because the Virginia Statute, under which the plaintiff claims the right to recover in this action is, as applied to the message mentioned in the plaintiffs declaration and to the plaintiffs alleged cause of action, repugnant to Article I, Section VIII, of the Constitution of the United States and, therefore, null and void.

A. L. HOLLADAY, *p. d.*

(*Declaration as Amended April 30th*, 1908.)

In the Law and Equity Court of the City of Richmond.

L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, plaintiffs, complain of The Western Union Telegraph Company, a non-resident corporation doing business in this
36 State, defendant.

Which said defendant is doing the business of receiving and transmitting messages for compensation, in this State, of a plea that it *rendered* unto the said plaintiff the sum of one hundred dollars, which to him the said defendant owes and from him unjustly detains, for this to-wit: that heretofore to-wit: on the 25th day of Sept. 1907 the said plaintiff at Richmond in the State of Virginia delivered to the said defendant company, doing business by its agents in said City, during business hours a message addressed to S. P. Morse & Son, Brockton, N. Y. in the following words and figures to-wit:

Pd. 9-25-7.

"S. P. Morse & Son, Brockton, N. Y.:

Ship at once car Black Grapes also some Niagra and Delaware if can answer at once.

CROVO & CRENSHAW."

Which said message or dispatch was then and there delivered to said company in the morning hours, between the hours of 9 and 10 o'clock, and the said message was then and there received by said defendant company, and the established charges were prepaid for the faithful and impartial transmission of the said message and as promptly as practicable in the order of delivery, and the said plaintiff avers that the said defendant negligently failed to transmit the said message as promptly as practicable and in the order of delivery; which negligence occurred within the State of Virginia: whereby and by virtue of the statute in such cases made and provided an action hath accrued to the said plaintiffs to have and demand of the said defendant the sum of one hundred dollars.

Yet the said defendant, although often requested has not
37 as yet paid to the said plaintiff the sum of $100.00 above demanded, or any part thereof, but the same to pay hath hitherto wholly failed and refused and still doth fail and refuse to the damage of the said plaintiff in the sum of One Hundred Dollars. And therefore he brings his Suit.

J. KENT RAWLEY, *p. q.*

And at another day to-wit: May 6th, 1908 (In Court).

This day came again the parties by counsel and the plaintiffs with the consent of the defendant filed in lieu of the declaration as amended by leave of Court on April 30th 1908 an amended declaration and by like consent of both parties the demurrer and the grounds thereof filed to said amended declaration on April 30th 1908 are to

be considered and treated as filed to the amended declaration and each count thereof, this day filed by consent. And thereupon the Court sustained the said demurrer as to the second count in said amended declaration and overruled the same as to the first count. And thereupon came a jury to-wit: Chas L. McCoull, Chas. F. Armitage, T. A. Jacob, Ro. J. Christian, James Augustine, Wm. H. Zimmerman and William Cameron being sworn well and truly to try the issues joined in this case and the evidence being heard the defendant demurred thereto and the plaintiff joined in the said demurrer. And the jury being required to ascertain the plaintiffs' debt returned a verdict in the words following, to-wit: "We the jury upon the issue joined find for the plaintiffs the debt in the declaration mentioned to-wit: One hundred dollars subject to the opinion of the Court to be rendered upon the defendant's demurrer to the evidence."

And the said demurrer to the evidence being argued and the Court being of opinion that the evidence is sufficient in law for the plaintiffs to maintain the issue joined on their part doth overrule
38 said demurrer.

Therefore it is considered by the Court that the plaintiffs recover against the defendant the sum of One hundred dollars with interest thereon to be computed after the rate of six per centum per annum from the 6th day of May 1908 until paid and their costs by them about their suit in this behalf expended. And the defendant by counsel having expressed his intention to apply for a writ of error from said judgment it is ordered that said judgment be suspended for a period of sixty days from the final day of the present term of this Court upon condition that the defendant or some one for it enter into bond before the Clerk of this court in the penalty of One hundred and fifty dollars with security to be approved by said Clerk and conditioned according to law within ten days from this date. And, by consent of all parties by counsel leave is hereby given said parties to file any bills of exceptions herein within sixty days from the final day of the present term of this Court.

In the Law and Equity Court of the City of Richmond.

L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, plaintiffs, complains of The Western Union Telegraph Company, a non-resident corporation doing business in this State, defendant.

Which said defendant is doing the business of receiving and transmitting messages for compensation, in this State, of a plea that it rendered unto the said plaintiff the sum of one hundred dollars, which to him the said defendant owes and from him unjustly detains, for this, to-wit: That heretofore, to-wit, on the 25th day of September 1907, the said plaintiff at Richmond, in the State
39 of Virginia delivered to the said defendant Company, doing business by its agents in said City, during business hours, a

message addressed to S. P. Morse & Son, Brockton, N. Y., in the following words and figures, to-wit:

Pd. 9-25-7.

"S. P. Morse & Son, Brockton, N. Y.:

Ship at once car Black Grapes also some Niagra and Delaware if can answer at once.

CROVO & CRENSHAW."

Which said message or dispatch was then and there delivered to said Company in the morning hours, between the hours of 9 and 10 o'clock, and the said message was then and there received by the said defendant Company, and the established charges were prepaid for the faithful and impartial transmission of the said message and as promptly as practicable in the order of delivery and the said plaintiff avers that the said defendant did not and negligently failed to transmit the said message as promptly as practicable; which negligence occurred within the State of Virginia, whereby and by virtue of the statute in such cases made and provided an action hath accrued to the said plaintiffs to have and demand of the said defendant the sum of one hundred dollars.

II Count.

And for this also, to-wit: That heretofore, to-wit on the 25th day of September, 1907, the said plaintiff at Richmond in the State of Virginia delivered to the said defendant Company, doing business by its agents in said City, during business hours, a message addressed to S. P. Morse & Son, Brockton, N. Y., in the following words and figures, to-wit:

40

Pd. 9-25-7.

"S. P. Morse & Son, Brockton, N. Y.:

Ship at once car Black Grapes also some Niagra and Delaware if can answer at once.

CROVO & CRENSHAW."

Which said message or dispatch was then and there delivered to said Company in the morning hours, between the hours of 9 and 10 o'clock, and the said message was then and there received by the said defendant Company, and the established charges were prepaid for the faithful and impartial transmission of the said message and as promptly as practicable in the order of delivery, and the said plaintiff avers that the said defendant did not and negligently failed to transmit the said message in the order of delivery; which negligence was committed within the State of Virginia, whereby and by virtue of the statute in such cases made and provided an action hath accrued to the said plaintiffs to have and demand of the said defendant the sum of one hundred dollars.

Yet the said defendant, although often requested, has not as yet paid to the said plaintiff the sum of $100.00 above demanded, or

any part thereof, but the same to pay hath hitherto wholly failed and refused and still doth fail and refuse to the damage of the said plaintiff in the sum of One Hundred Dollars.

And therefore he brings his suit.

J. KENT RAWLEY, *p. q.*

(Demurrer to Evidence.)

In the Law and Equity Court of the City of Richmond.

CROVO AND CRENSHAW, Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

41 Be it remembered that after the jury was sworn to try the issue joined in this cause, the plaintiff and defendant introduced the following evidence, which is all the evidence that was introduced, and which is made a part of this demurrer to evidence.

The plaintiff to prove and maintain the said issue on his part introduced the following evidence:

W. C. CRENSHAW, the only witness for the plaintiff, testified as follows:

I am a member of the plaintiff firm and on September 25th, 1907, about 9:30 A. M. I filed with the defendant company, at its office in the City of Richmond, in the State of Virginia, for transmission to Brockton, in the State of New York, a message dated September 25th, 1907, addressed to S. P. Morse & Son, Brockton, N. Y., a carbon copy of which I preserved and now have in my hand and read to the jury as follows:

Pd. 9-25-7.

S. P. Morse & Son, Brockton, N. Y.:

Ship at once car Black Grapes also some Niagra and Delaware if can answer at once.

CROVO AND CRENSHAW.

that the next I heard of said message I received about 5:30 P. M. on that afternoon the following notice which I now have in my hand and read to the jury as follows:

Form No. 101. 332

The Western Union Telegraph Company.

(Incorporated.)

RICHMOND, VA., *Sept.* 25, 1907.

M. Crovo and Crenshaw:

Your dispatch dated today to S. P. Morse & Sons Brooklyn
42 New York is undelivered.

Reason: Unable to Locate party Give Better Address.

A. C. STEVENSON,
Per C.,
Manager, Richmond, Va., Office.

N. B.—Changes in the address must be paid for at the usual rates.

Recd. 5:30.

that said notice was handed to me by a boy in the uniform of the defendant company; that I then 'phoned to the office of the defendant company in the city of Richmond and asked about said message and was told in response to my 'phone communication that they would look into the matter; that I did not pay for the message at the time but it was the custom of the defendant company to send our messages for us marked "Paid" and to send us a ticket thereafter for payment; that a slip showing the charge of the defendant company for said message was thereafter sent to my firm through the defendant company's collector and was paid.

Form No. 12.

Due The Western Union Telegraph Company.
(Incorporated.)

For Messages 190–

.....

Cts.

To Brockton N. Y. 68

W. U. Telegraph Co.
Sept. 25 1907
From Richmond, Va.

Crovo & Crenshaw
Signature Total

On cross examination this witness testified that he did not know the uniformed messenger of the defendant company who brought said notice to him about 5:30 P. M. on September 25, 1907:
43 that he knew nothing as to when said message left the City of Richmond, in the State of Virginia, or where the delay in its transmission occurred or whether the delay occurred in the City of Richmond, Virginia, or in the City of New York, in the State of New York.

And thereupon the plaintiffs rested their case.

And the defendant company to prove and maintain the said issue on its part introduced the following evidence:

A. C. STEPHENSON, a witness for the defendant company, testified as follows:

I am employed as Manager of the defendant Company at its office in the City of Richmond, Virginia, and have been in the service of the defendant company for about 34 years; that the notice sent to the plaintiffs on the afternoon of September 25th, 1907, was sent from my office; that I had received a service message from the City of Brooklyn, in the State of New York, showing that the message involved in this suit was transmitted by the defendant to the City of Brooklyn, New York, and was undelivered in the City of Brooklyn, in the State of New York, and said notice sent from my office no-

tified the plaintiffs of that fact and asked them for a better address; that there was not at that time any direct wire for the transmission of messages from the City of Richmond, in the State of Virginia, to either Brooklyn, in the State of New York, or Brockton, in the State of New York; that the usual and proper route for the transmission of a message from Richmond, in the State of Virginia, to either Brockton, in the State of New York, or *Brockton*, in the State of New York, was for the message to be transmitted on a through wire from Richmond, in the State of Virginia, to New York City, in the State of New York and in the City of New York, in the State of New York, taken from the wire of the defendant and written out and relaid and resent and retransmitted from New York City, in the State of New York, to the point of address, whether Brooklyn, in the State of New York, or Brockton, in the State of New York; that in the transmission of a message from New York City, in the State of New York, to Brockton, in the State of New York, the message would have to be again relaid in the City of Buffalo, in the State of New York, in the manner above described for relaying messages: that in the transmission of a message from Richmond, in the State of Virginia, to New York City, in the State of New York, over a direct wire, as above stated, such transmission is instantaneous; that is to say, when such message leaves the City of Richmond, in the State of Virginia, it instantaneously reaches the office of the defendant company in New York City, in the State of New York.

44

But the Court certifies that the witness Stevenson testified that the notice sent to the plaintiff at 5:30 P. M. of the evening of Sept. 25th in the usual and ordinary course of business meant that the message was sent from Richmond, Virginia, to Brooklyn, N. Y., and not to Brockton, N. Y. Court further certifies that during examination of plaintiff counsel for company cross examined plaintiff as to spelling of Brockton, New York, asking them if he did not know that Brockton N. Y. was spelt with "K" and plaintiff then tendered telegram from Brockton of the day before and delivered from defendant showing the spelling to be with "K" which message was introduced over objection of defendant, and is in *in* the following words and figures:

3214L.

Received at No. 1217 East Main Street, Richmond, Va.

44FX N9 9paid

FX BROCKTON, N. Y., *Sept.* 24, '07.

Cravo and Crenshaw, Richmond, Va.:

Offer pony wordens eleven cents today for tomorrow's shipment.

S. O. MORSE AND SON.

7:15 p.
Always open.

Money Transferred by Telegraph. Cable Office.

45 R. C. THOMPSON, another witness introduced by the defendant company, testified as follows:

I have been in the service of the defendant company for 35 years. I am now and on September 25, 1907, was Traffic Chief in charge of the defendant's telegraph office for the transmission of messages in the City of Richmond, in the State of Virginia; that it was my duty to superintend the routing and transmission of messages going from said office and I was then and am now acquainted with the usual and proper mode of routing and transmitting messages; that on September 25th, 1907, there was no direct wire for the transmission of messages from the City of Richmond, in the State of Virginia, to either Brooklyn, in the State of New York, or Brockton, in the State of New York; that the usual and proper route and routing and the one then used by the defendant for the transmission of messages by the defendant company from its said office in the City of Richmond, in the State of Virginia, to either Brooklyn, New York, or Brockton, New York, was for the message to be transmitted on a through wire from its said office at Richmond, in the State of Virginia, to its office in New York City, in the State of New York, and at the last named point taken from the wire of the defendant and written out and relaid and retransmitted from its said office in the City of New York, in the State of New York, to the point of address, whether Brooklyn, N. Y. or Brockton, N. Y.; that in the transmission of a message from New York City, N. Y., to Brockton, N. Y., the message would have to be again relaid in the City of Buffalo, New York, in the manner above described for relaying messages; that in the transmission of a message from the defendant's said office in the City of Richmond, Virginia, to New York City, in the State of New York, as above described, such transmission is instantaneous; that is to say, when such message

46 leaves the office of the defendant in the City of Richmond, Virginia, it instantaneously reaches the office of the defendant in New York City, in the State of New York.

And the said defendant says that the matter aforesaid, so introduced and shown in evidence to the jury by the plaintiff is not sufficient in law to maintain the said issue on the part of the plaintiff, and that it, the said defendant, is not bound by the law of the land to answer the same, because;

1. There is no proof that the delay complained of occurred in the State of Virginia, and proof of that fact is necessary to sustain this action.

2. There is no proof that the delay complained of occurred in the State of Virginia and without such proof the Virginia Penalty Statute, upon which the plaintiffs rely, is, as applied to the plaintiffs' cause of action, in contravention of and repugnant to Article I, Section VIII of the Constitution of the United States, and, therefore, null and void.

2*a*. There is no proof that the delay complained of occurred in the State of Virginia and without such proof the Virginia Penalty Statute upon which the plaintiffs rely, is, as applied to the plaintiffs'

cause of action, in contravention of and repugnant to Amendment XIV to the Constitution of the United States in that it gives said Penalty Statute extra-territorial effect and treats said statute as having vitality and force outside of the territorial limits of the Commonwealth of Virginia and treats said statute as giving the plaintiff a right to recover in this action for an alleged default or alleged neglect of duty on the part of the defendant which did not occur within the territorial limits of the Commonwealth of Virginia and because said Penalty Statute as construed and applied by the Court

(*a*) abridges the privileges or immunities of the defendant;

47 (*b*) deprives the defendant of its property without due process of law; (*c*) and denies to the defendant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States; and because said Statute as construed and applied by the Court in this action deprives the defendant of its property without due process of law and takes from the defendant its property without just or adequate compensation in violation of Article V of the Constitution of the United States—and for the reasons aforesaid the said Penalty Statute is null and void as applied to the plaintiffs' cause of action.

3. Because the Virginia Penalty Statute, under which the Plaintiffs seek to recover in this action, does not apply to or regulate a message filed with the defendant to be transmitted from Richmond, in the State of Virginia, to Brockton, in the State of New York, and if so construed or applied by this court, is null and void, because repugnant to Article I section VIII of the Constitution of the United States.

4. Because the Virginia Penalty Statute, under which the plaintiffs seek to recover in this action, does not and cannot apply to or regulate that part of the transmission outside of the State of Virginia of the message mentioned in the plaintiffs' declaration, and without evidence showing that a default occurred in the State of Virginia, no judgment against the defendant in this action can be sustained.

5. Because if the delay complained of occurred in the City of New York, in the State of New York, or at any other point in the State of New York, or at point outside of the State of Virginia the statute of Virginia upon which the plaintiffs rely, to sustain their action, neither has nor can have any lawful application; and if said Statute be construed to apply outside of Virginia, the said Statute is repugnant to Article I, section VIII of the Constitution of the United States, and is therefore, null and void.

48 6. Because the penalty Statute of Virginia upon which the plaintiffs rely is, as construed and applied by the Court to this action, an attempt to regulate interstate commerce in violation of Article I, section VIII of the Constitution of the United States and said Statute as applied by the court to this action is, therefore, null and void.

Wherefore, for want of sufficient matter in that behalf to the said jury showing in evidence, the defendant prays judgment, and that the jury aforesaid may be discharged from giving any verdict upon

the said issue, and that the said plaintiff may be barred from giving or maintaining his action aforesaid against him.

A. L. HOLLADAY,
A. B. DICKINSON,
p. d.

And the said plaintiff joins in the foregoing demurrer to the evidence and says that the matters aforesaid to the jurors in the form aforesaid shown in the evidence is sufficient in law to maintain the issue joined on the part of the plaintiff. Wherefore the plaintiff demands judgment, and the jury being discharged after they had assessed the plaintiff's damages &c.

J. KENT RAWLEY, *p. q.*

Opinion of the Court.

Reasons for giving judgment against defendant on demurrer to the evidence—Because under rule as to demurrers to evidence in Virginia all evidence of demurrant in conflict with plaintiff's evidence is waived, and plaintiff is entitled to all inferences from defendant's evidence favorable to plaintiff, and as in the opinion of Court jury in this case from the evidence, facts and circumstances might have found that negligence occurred here in State of Va. in Richmond Office—in other words, that message was sent to
49 Brooklyn, N. Y., and not to Brockton, N. Y., and the message was so sent from the Richmond Office and that delay was from about nine or nine thirty in the morning until after 5:30 in the evening at least as notice of Company shows. Judgment is given for plaintiff against defendant.

(*Bill of Exceptions.*)

In the Law and Equity Court of the City of Richmond.

CROVO AND CRENSHAW, Plaintiffs,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

Be it remembered that upon the trial of this action, after the plaintiffs had introduced their evidence and the defendant had introduced its evidence, as set out in the written demurrer to evidence hereby referred to and made a part of this bill of exceptions, the defendant filed its written demurrer to the evidence, as shown in said demurrer to evidence, stating the several grounds of said demurrer to which plaintiff replied and joined in demurrer but the Court refused to sustain said demurrer and overruled the same and filed reasons therefor in writing made part of the record and entered judgment thereon in favor of the plaintiff, to which action of the Court in refusing to sustain said demurrer and in overruling the same and in entering judgment for the plaintiff instead of entering

judgment for the defendant, the defendant by counsel excepted and tenders this, its bill of exceptions No. 1, which it prays may be signed, sealed and enrolled and made a part of the record in this action, which is accordingly done.

JOHN H. INGRAM. [SEAL.]

50 I, P. P. Winston, Clerk of the Law and Equity Court of the City of Richmond, do hereby certify that the foregoing is a true transcript of the record in the case of Crovo & Crenshaw plaintiffs, against the Western Union Telegraph Company, defendant, and that the said plaintiffs had due notice of the intention of the said defendant to apply for such transcript.

Given under my hand this 19th day of May, 1908.

P. P. WINSTON, *Clerk.*

Fee for record $5.00.

51 VIRGINIA:

In the Supreme Court of Appeals, Held at the Court House Thereof, in the City of Staunton, on Thursday, the 10th Day of September, 1908.

The petition of the Western Union Telegraph Company for a writ of error and supersedeas to a judgment of the Law and Equity Court of the City of Richmond, entered on the 6th day of May, 1908, in the cause then therein pending of Crovo & Crenshaw against the said Western Union Telegraph Company, having been maturely considered and the transcript of the record of the said judgment seen and inspected, the court being of the opinion that the said judgment is plainly right, doth refuse the writ of error and supersedeas prayed for.

52 In the Supreme Court of Appeals of Virginia, at Staunton.

STATE OF VIRGINIA,
City of Richmond, To-wit:

I, Alexander W. May, Clerk of the Supreme Court of Appeals of Virginia, at Staunton, do hereby certify that the writings annexed to this certificate are true copies of the originals of the record in the case of Western Union Telegraph Company against L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, on file and of record in my said office, and that said originals, together, constitute the records of the proceedings of said court in this cause.

Witness my hand and seal of said court, this the — day of September, 1908.

[Seal Supreme Court of Appeals of Virginia, Staunton.]

ALEXANDER W. MAY, *Clerk.*

I, James Keith, President and one of the Judges of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is the true and genuine signature of Alexander W. May, Clerk of said Court at Staunton, and that the foregoing attestation made by him is in due form.

Witness my hand and seal this the — day of September, 1908.

JAMES KEITH, *President.* [SEAL.]

I, Alexander W. May, Clerk of said Court at Staunton, do hereby certify that the Honorable James Keith, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, President of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of said Court, this the — day of September, 1908.

[Seal Supreme Court of Appeals of Virginia, Staunton.]

ALEXANDER W. MAY, *Clerk.*

53 In the Supreme Court of Appeals of Virginia.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

vs.

L. J. CROVO and W. C. CRENSHAW, Partners, Trading as Crovo & Crenshaw, Defendants in Error.

Assignment of Errors with Petition for Writ of Error.

Your petitioner, The Western Union Telegraph Company, plaintiff in error, comes and herewith files its petition for a writ of error and supersedeas and says that there are errors in the record and proceedings of the cause lately before the Supreme Court of Appeals of Virginia, entitled in that court The Western Union Telegraph Company, plaintiff in error, against L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, defendants in error, on an application for a writ of error to a final judgment rendered by the Law and Equity Court of the City of Richmond on May 6, 1908, in favor of said Crovo and Crenshaw against your petitioner for one hundred dollars and costs in a cause then depending in the latter court, wherein said Crovo and Crenshaw were plaintiffs and your petitioner was defendant, and thereupon your petitioner makes the following assignment of errors.

The said judgment was controverted and drawn in question by your petitioner, the plaintiff in error, on the ground that said judgment was and is repugnant to that part of Article I Section VIII of the Constitution of the United States providing that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and in contravention thereof in the following particulars:

54

First.

The Supreme Court of Appeals of Virginia (*a*) erred in failing to hold that the telegraphic dispatch described in the declaration of the defendants in error, Crovo and Crenshaw, came within the regulating power of that provision of Article I Section VIII of the Constitution of the United States providing that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and (*b*) erred in failing to hold that the transmission of said telegraphic dispatch was interstate commerce and not subject to the control or regulation of the Penalty Statute of Virginia under which the said Crovo and Crenshaw recovered a judgment against your petitioner, the plaintiff in error, the said statute being Section V of Chapter VIII of the Act of the General Assembly of Virginia entitled "An Act concerning public service corporations," approved January 18, 1904, and acts amendatory thereof.

Second.

The Supreme Court of Appeals of Va. erred in failing to hold that the Penalty Statute of Virginia, upon which the defendants in error, Crovo and Crenshaw, relied and obtained said judgment, viz., Section V of Chapter VIII of the Act of the General Assembly of Virginia, entitled, "An Act concerning public service corporations," approved January 18, 1904, and acts amendatory thereof, was and is, as construed and applied by said court (and the trial court) to this action, an attempt to regulate interstate commerce in violation of that provision of Article I Section VIII of the Constitution of the United States providing that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and that said Penalty Statute of Virginia as applied by said Supreme Court of Appeals of Virginia (and the trial court) to this action was and is, therefore, null and void.

55

Third.

The Supreme Court of Appeals of Virginia erred in failing to reverse said judgment of the Law and Equity Court of the City of Richmond and erred in failing to enter judgment in favor of your petitioner, the plaintiff in error, because the Penalty Statute of Virginia, upon which the defendants, Crovo and Crenshaw, relied and obtained said judgment is, as construed and applied by the court to this action, an attempt to regulate interstate commerce and a regulation thereof in violation of Article I Section VIII of the Constitution of the United States, and said statute as applied by the court to this action is, therefore, null and void.

For which errors the plaintiff in error, The Western Union Telegraph Company, prays that said judgment of the Supreme Court of Appeals of Virginia, dated the 10th day of September, 1908, may be reviewed and reversed and that a judgment may be rendered in favor of your petitioner the plaintiff in error, reversing

said judgment of the Supreme Court of Appeals of Virginia and said judgment of the Law and Equity Court of the City of Richmond; and that all such other and further and general and complete relief as may be proper in the premises may be granted. And your petitioner will ever pray, etc.

THE WESTERN UNION TELEGRAPH COMPANY,
By A. L. HOLLADAY, *Its Counsel.*

56 In the Supreme Court of Appeals of Virginia.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
vs.
L. J. CROVO and W. C. CRENSHAW, Partners Trading as Crovo & Crenshaw, Defendants in Error.

Your petitioner, The Western Union Telegraph Company, plaintiff in error, conceiving itself aggrieved by the final order and decision of the Supreme Court of Appeals of Virginia rendered on the 10th day of September, 1908, refusing to grant to your petitioner a writ of error and supersedeas from a final decision and order of the Law and Equity Court of the City of Richmond, rendering judgment on May 6, 1908, in favor of Crovo and Crenshaw against your petitioner for one hundred dollars and costs, as shown by the record from said Law and Equity Court in the action therein lately depending wherein L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, were plaintiffs and your petitioner, The Western Union Telegraph Company was defendant, a duly certified transcript of which, together with your petitioner's written petition, and assignment of errors, praying for a writ or error and supersedeas is on file in the records of the Supreme Court of Appeals of Virginia—

Now comes and prays for a writ of error and supersedeas from the said decision and judgment of the Supreme Court of Appeals of Virginia rendered on the 10th day of September, 1908, to the Supreme Court of the United States; and your petitioner attaches hereto as a part of this petition, its assignment of errors.

THE WESTERN UNION TELEGRAPH COMPANY,
By A. L. HOLLADAY, *Its Counsel.*

57 A writ of error is hereby allowed as prayed by the petitioner, The Western Union Telegraph Company.

Let the writ of error issue upon the execution of a bond by The Western Union Telegraph Company, or some one for it, to the defendants, Crovo and Crenshaw, in the sum of $200.00 to cover costs; but said bond is not to operate as a supersedeas.

JAMES KEITH,
President Supreme Court of Appeals of Virginia.

September 29th, 1908.

58 THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,

vs.

L. J. CROVO and W. C. CRENSHAW, Partners Trading as Crovo & Crenshaw, Defendants in Error.

Bond to Cover Costs.

Know all men by these presents that we L. J. Maxwell as principal, and Addison L. Holladay as surety, are held and firmly bound unto L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, in the sum of two hundred dollars to be paid to said Crovo and Crenshaw, to which payment well and truly to be made we bind ourselves, jointly and severally, firmly by these presents. Sealed with our seals this 29th day of September, 1908.

Whereas The Western Union Telegraph Company, plaintiff in error, in the above entitled cause, seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Supreme Court of Appeals of Virginia.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

L. J. MAXWELL. [SEAL.]
ADDISON L. HOLLADAY. [SEAL.]

The foregoing bond is approved:

JAMES KEITH,
President Supreme Court of Appeals of the State of Virginia.

59 The original of the foregoing bond was lodged with the Clerk of the Supreme Court of Appeals of Virginia on October 19th, 1908, and the following endorsement made thereon: Bond. Filed October 19th, 1908.

ALEX. W. MAY,
Clerk of the Supreme Court of Appeals of Virginia.

60 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Supreme Court of Appeals of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of Appeals of the State of Virginia, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Western Union Telegraph Company a corporation chartered and existing under the laws of the

State of New York, Plaintiff in Error, and Lawrence J. Crovo and Walter C. Crenshaw, partners trading as Crovo & Crenshaw, Defendants in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of The Western Union Telegraph Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
61 concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at the City of Washington, District of Columbia, on the 27th day of October, 1908, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of October, in the year of our Lord one thousand nine hundred and eight.

[Seal United States Circuit Court, Western District of Virginia.]

A. K. FLETCHER,
Clerk of the United States Circuit Court
for the Western District of Virginia.

Allowed by
JAMES KEITH,
President of the Supreme Court
of Appeals of Virginia.

62 The foregoing original writ of error was lodged with the Clerk of the Supreme Court of Appeals of Virginia on October 19th, 1908, and also at the same time and place two copies thereof were lodged in the said Clerk's Office, one copy thereof for said Lawrence J. Crovo, and the other copy thereof for said Walter C. Crenshaw.

The following endorsement was made upon said original writ of error and upon each of said copies thereof:

Writ of Error. Filed October 19th, 1908.

ALEX. W. MAY,
Clerk of the Supreme Court of Appeals of Virginia.

63 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of Appeals of Virginia, at Staunton, wherein you are defendants in error and The Western Union Telegraph Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the president of the Supreme Court of Appeals of Virginia this 29th day of September, 1908.

JAMES KEITH,
President Supreme Court of Appeals of the State of Virginia.

64 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to L. J. Crovo and W. C. Crenshaw, partners trading as Crovo & Crenshaw, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within 30 days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of Appeals of Virginia at Staunton, wherein you are defendants in error and the Western Union Telegraph Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the president of the Supreme Court of Appeals of Virginia, this 29th day of September, 1908.

JAMES KEITH,
President Supreme Court of Appeals of the State of Virginia.

A Copy.
Teste:
A. W. MAY, *Clerk.*

Legal service of the above citation is hereby acknowledged.
WALTER C. CRENSHAW &
LAWRENCE J. CROVO,
Partners, &c.,
By J. KENT RAWLEY, *Att'y.*
10/20/08.

65 UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, ss:

In obedience to the commands of the within writ, I hereby transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Appeals of Virginia in the City of Staunton, this 19th day of October, 1908.

[Seal Supreme Court of Appeals of Virginia, Staunton.]

ALEX. W. MAY,
Clerk of the Supreme Court of Appeals of Virginia, at Staunton, Virginia.

Costs of this record $18.50/100 dollars.

Paid by A. L. Holladay, Counsel for Western Union Telegraph Company.

ALEX. W. MAY,
Clerk of the Supreme Court of Appeals of Virginia, at Staunton, Virginia.

Endorsed on cover: File No. 21,390. Virginia, Supreme Court of Appeals. Term No. 594. The Western Union Telegraph Company, plaintiff in error, *vs.* Lawrence J. Crovo and Walter C. Crenshaw, partners, trading as Crovo & Crenshaw. Filed October 29th, 1908. File No. 21,390.

Supreme Court, U. S.
FILED.
FEB 9 1910
JAMES H. McKENNEY,

In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

AGAINST

LAWRENCE J. CROVO and WALTER C. CRENSHAW, Partners, Trading as Crovo & Crenshaw,
Defendants in Error.

No. 268.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

AGAINST

LAWRENCE J. CROVO and WALTER C. CRENSHAW, Partners, Trading as Crovo & Crenshaw,
Defendants in Error.

No. 87.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

These writs of error grow out of the same case below, the only difference between them being that in No. 268 the writ of error out of this court is directed to the court of first instance, the Law and Equity

Court of the City of Richmond, while in No. 276 the writ of error out of this court is directed to the Supreme Court of Appeals of the State of Virginia.

The action was commenced in the Law and Equity Court of the City of Richmond in January, 1908. On May 6, 1908, judgment was rendered in that court for the plaintiffs below. The defendant below applied to the Supreme Court of Appeals of Virginia for a writ of error out of that court to the Law and Equity Court of the City of Richmond; and the Supreme Court of Appeals of Virginia on September 10, 1908, made an order (record, page 16) * to the effect that "*the court being of the opinion that the said judgment is plainly right*, doth *refuse the writ of error*." In this situation counsel for plaintiff in error felt some uncertainty whether the final judgment to which the writ of error out of this court ought to be directed was the judgment of the Law and Equity Court of the City of Richmond, rendered May 6, 1908, or the order of the Supreme Court of Appeals of Virginia entered September 10, 1908: hence the two separate writs.

Nature of the Case.

The action was brought by Crovo & Crenshaw, plaintiffs below, to recover from the Western Union Telegraph Company, defendant below, the penalty of $100 provided by section 5 of chapter VIII of the Act of the General Assembly of Virginia entitled "An act concerning public service corporations," approved January 18, 1904, and acts amendatory thereof, which statute, at the time of the commencement of the suit, was, as far as material, as follows:

"RECEIPT AND TRANSMISSION OF DISPATCHES.—

"It shall be the duty of every telegraph company

* The references are, for convenience, to the record in number 268.

doing business in this State to receive and transmit dispatches from and for other telegraph or telephone companies or lines, and from and for any person, upon the payment of the usual charges therefor, if such payment is demanded; to transmit the same faithfully, impartially, with substantial accuracy, as promptly as practicable, and in the order of delivery to said company. For every failure to transmit a dispatch and for every failure to transmit a dispatch faithfully, impartially, or with substantial accuracy, and for every failure to transmit a dispatch as promptly as practicable, or in the order of its delivery to the company the company shall forfeit the sum of one hundred dollars to the person sending or offering to send such dispatch, or to the person to whom it was addressed; provided, however, that not more than one recovery shall be had on one dispatch, and the recovery by one party entitled thereto shall be a bar to the recovery of the other party. But nothing herein shall prevent any such company from giving preference to dispatches on official business from or to officers of the United States or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers for the transmission to them for publication of intelligence of general and public interest out of its regular order."

The Federal Question.

The Federal question, to determine which the case is brought to this court, is whether, under Article I, section 8, subdivision 3 of the Constitution of the United States, the State of Virginia may lawfully impose a penalty for the failure of a telegraph company promptly to transmit a message from a point within the State of Virginia over a direct wire to a point in another State (1) under any circumstances and (2) especially where, as in this case, there is no evidence of any breach of duty within the territorial limits of the State of Virginia

The Pleadings.

The second amended declaration, under which the case proceeded to trial (record, pages 7 and 8), consisted of two counts. To the second count, however, the trial court sustained a demurrer (record, page 6) and it may therefore be eliminated from consideration here. The first count, on which the judgment was rendered, alleged that :

> " On the 25th day of September, 1907, the said plaintiff at Richmond in the State of Virginia delivered to the said defendant company, doing business by its agents in said city, during business hours a message addressed to S. P. Morse & Son, Brockton, N. Y." (describing the message) " between the hours of 9 and 10 o'clock, and the said message was then and there received by the said defendant company, and the established charges were prepaid for the faithful and impartial transmission of the said message and as promptly as practicable in the order of delivery, and the said *plaintiff avers that the said defendant did not and negligently failed to transmit the said message as promptly as practicable ; which negligence occurred in the State of Virginia,* whereby and by virtue of the statute in such cases made and provided an action hath accrued to the said plaintiffs to have and demand of the said defendant the sum of one hundred dollars " (record, page 7).

The defendant demurred, pleaded in abatement, and filed a special plea and a plea of *nil debet*, the general issue, in bar. The special plea is found at page 5 of the record, but as the Federal question was fully presented under the general issue, by a demurrer to the evidence (record, pages 8 to 13), the defendant's pleas need not be more fully considered.

The Testimony.

On the trial in the Law and Equity Court of the City of Richmond, on May 6, 1908, one of the plaintiffs, W. C. Crenshaw, testified in substance as follows (record, p. 8): that on September 25, 1907, at about 9.30 A. M., he filed the message in question addressed to "Brocton" N. Y. with the defendant at its office in the city of Richmond; that "the next" he "heard of the said message" he received about 5.30 P. M. on that afternoon a notice in the following language: "Richmond, Va. September 25, 1907. Your dispatch dated today to S. P. Morse & Son, *Brooklyn*, N. Y. is undelivered. Reason: unable to locate party. Give better address. (Signed) A. C. Stevenson, manager, Richmond, Va. office"; that this notice was handed to him by a boy in the uniform of the defendant; that he telephoned to the defendant's office in Richmond "and asked about said message" and was told "that they would look into the matter" (record, p. 9). That the tolls for the message were charged to his account and thereafter paid; *that he knew nothing as to when said message left the city of Richmond in the State of Virginia, or where the delay in its transmission occurred, or whether the error occurred in the city of Richmond, Virginia, or in the city of New York*, in the State of New York (record, page 10).

The plaintiffs then rested.

The defendant called two witnesses: A. C. Stevenson, the Richmond manager, and R. C. Thompson, the Richmond traffic chief.

These witnesses both testified (record, pp. 10, 11) that there was **not at that time any direct wire for the transmission of messages from the city of Richmond, in the State of Virginia, to either Brooklyn, N. Y., or Brockton, N. Y.**; that the usual and proper route for the transmission of such a message was for the message to be *transmitted on a through wire from Richmond, Va., to New York City, N. Y.*, and there

taken from the wire and written out and relayed and resent from New York City, N. Y. to the point of address, whether Brooklyn, N. Y. or Brockton, N. Y.; that in the transmission of a message from Richmond to New York City over a direct wire as above stated, *such transmission is instantaneous;* "that is to say, when such message leaves the city of Richmond, in the State of Virginia, it instantaneously reaches the office of the defendant company in New York City" (record, pp. 10, 11 and 12).

In addition, the witness Stevenson testified as follows:

> "The notice sent to the plaintiffs on the afternoon of September 25th, 1907, was sent from my office; (that) I had received a service message from the city of Brooklyn, in the State of New York, showing that the message involved in this suit was transmitted by the defendant to the city of Brooklyn, New York, and was undelivered in the city of Brooklyn, in the State of New York, and said notice sent from my office notified the plaintiffs of that fact and asked them for a better address" (Record, p. 10).

The witness Stevenson also testified that the notice sent to the plaintiff "meant that the message was sent from Richmond, Virginia, to Brooklyn, New York, and not to Brockton, New York."

Both sides then rested, and the defendant demurred to the evidence on six separate grounds, all seeking, in various forms, to present the same question, which is thus stated in ground 6:

> "6. Because the penalty statute of Virginia upon which the plaintiffs rely is, as construed and applied by the court to this action, an attempt to regulate interstate commerce in violation of Article I, section VIII. of the Constitution of the United States, and said statute as applied by the

court to this action is, therefore, null and void" (record, page 13).

The plaintiffs joined in the demurrer to the evidence (record, page 13).

Judgment of the Law and Equity Court of the City of Richmond.

The Court gave judgment in favor of the plaintiffs and against the defendant on the demurrer to the evidence:

> "as in the opinion of court jury in this case from the evidence, facts and circumstances might have found that negligence occurred here in State of Va. in Richmond Office—in other words, that message was sent to Brooklyn, N. Y., and not to Brockton, N. Y., and the message was so sent from the Richmond Office and that delay was from about nine or nine thirty in the morning until after 5.30 in the evening at least as notice of Company shows" (Record, page 13).

To the action of the court in overruling the demurrer to the evidence and in entering a judgment for the plaintiffs instead of entering a judgment for the defendant, the defendant duly excepted (Bill of Exceptions No. 1, record, page 14).

Disposition of the Case by the Supreme Court of Appeals of Virginia.

Application was then made to the Supreme Court of Appeals of Virginia for a writ of error, which was refused by that court, "the court being of the opinion that the said judgment is plainly right" (record, page 16), whereupon these writs of error were sued out.

Assignment of Errors.

The following errors are assigned (in No. 268):

"FIRST.

"The Law and Equity Court of the City of Richmond (*a*) erred in failing to hold that the telegraphic dispatch described in the declaration of the plaintiffs, Crovo and Crenshaw, came within the regulating power of that provision of Article I. section VIII. of the Constitution of the United States providing that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes, and (*b*) erred in failing to hold that the transmission of said telegraphic dispatch was interstate commerce and not subject to the control or regulation of the Penalty Statute of Virginia under which the said Crovo and Crenshaw recovered a judgment against your petitioner, the plaintiff in error, the said statute being Section V. of Chapter VIII. of the Act of the General Assembly of Virginia entitled, 'An Act concerning public service corporations,' approved January 18, 1904, and acts amendatory thereof.

"SECOND.

"The Law and Equity Court of the City of Richmond erred in failing to hold that the Penalty Statute of Virginia upon which the defendants in error, Crovo and Crenshaw, relied and obtained said judgment, viz., Section V. of Chapter VIII. of the Act of the General Assembly of Virginia, entitled 'An Act concerning public service corporations,' approved January 18, 1904, and acts amendatory thereof, was and is, as construed and applied by said court to this action, an attempt to regulate interstate commerce in violation of that

provision of Article I. Section VIII. of the Constitution of the United States providing that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes, and that said Penalty Statute of Virginia as applied by said Law and Equity Court of the City of Richmond to this action was and is, therefore, null and void.

" THIRD.

" The Law and Equity Court of the City of Richmond erred in failing to enter judgment in favor of your petitioner, the plaintiff in error, because the Penalty Statute of Virginia, upon which the defendants, Crovo and Crenshaw, relied and obtained said judgment is, as construed and applied by the court to this action, an attempt to regulate interstate commerce and a regulation thereof in violation of Article I., Section VIII. of the Constitution of the United States, and said statute as applied by the court to this action is, therefore, null and void."

In No. 276 the assignments of error, raising the same questions, are as follows :

" FIRST.

" The Supreme Court of Appeals of Virginia (*a*) erred in failing to hold that the telegraphic dispatch described in the declaration of the defendants in error, Crovo and Crenshaw, came within the regulation power of that provision of Article I., Section VIII. of the Constitution of the United States providing that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes, and (*b*) erred in failing to hold that the transmission of said telegraphic dispatch was interstate commerce and not subject to the control

or regulation of the Penalty Statute of Virginia under which the said Crovo and Crenshaw recovered a judgment against your petitioner, the plaintiff in error, the said statute being Section V. of Chapter VIII. of the Act of the General Assembly of Virginia entitled 'An Act concerning public service corporation,' approved January 18, 1904, and acts amendatory thereof.

"SECOND.

"The Supreme Court of Appeals of Virginia erred in failing to hold that the Penalty Statute of Virginia upon which the defendants in error, Crove and Crenshaw, relied and obtained said judgment, viz., Section V. of Chapter VIII. of the Act of the General Assembly of Virginia, entitled 'An Act concerning public service corporations,' approved January 18, 1904, and acts amendatory thereof, was and is, as construed and applied by said court (and the trial court) to this action, an attempt to regulate interstate commerce in violation of that provision of Article I., Section VIII. of the Constitution of the United States providing that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes, and that said Penalty Statute of Virginia as applied by said Supreme Court of Appeals of Virginia (and the trial court) to this action was and is, therefore, null and void.

"THIRD.

"The Supreme Court of Appeals of Virginia erred in failing to reverse said judgment of the Law and Equity Court of the City of Richmond and erred in failing to enter judgment in favor of your petitioner, the plaintiff in error, because the Penalty Statute of Virginia, upon which the de-

fendants, Crovo and Crenshaw, relied and obtained said judgment is, as construed and applied by the court to this action, an attempt to regulate interstate commerce and a regulation thereof in violation of Article I, Section VIII of the Constitution of the United States, and said statute as applied by the court in this action is, therefore, null and void."

ARGUMENT.

I.

The State cannot impose a penalty for failure to transmit a message "as promptly as practicable" over a direct wire from a point within to a point without the State.

The statute under consideration does not, in terms, prescribe a penalty for the failure of a telegraph company, through its agent at the sending office, *to make an effort to transmit* a message. The obligation which the statute imposes is the complete obligation *to transmit.*

To transmit a telegram is an act which cannot be accomplished at one telegraph office. It requires action at at least two. There must be (1) an office of origin, and an operator sending from that office; (2) an office of destination, and an operator receiving at that office; and (3) favorable conditions at all the intervening places along the line. All three conditions must coexist before the act of transmission can be completed.

If, therefore, the State of Virginia is to be permitted to impose a penalty for failure to transmit a message as promptly as practicable from Richmond, Va., to

New York City, N. Y., it is permitted to penalize the company because of the failure to accomplish a result which requires concurrent action on the part of the company's employees (1) in Virginia, and (2) in New York, and (3) the existence of favorable conditions (requiring more or less action on the part of the company's employees to create and preserve them) in the intervening States and in the District of Columbia.

It is clear that a penal statute of this character is invalid as an attempted regulation of interstate commerce by a State.

W. U. Tel. Co. vs. Pendleton.

In the Pendleton case (122 U. S. 347) it appeared that a statute of Indiana (Revised Statutes of Ind., 1881, sections 4176, 4178) required telegraph companies to deliver dispatches by messenger to the persons to whom the same were addressed, or to their agents, provided they resided within one mile of the telegraphic station, or within the city or town in which such station was, under a penalty of one hundred dollars. The plaintiff below in that case sued to recover the above penalty for the failure of the telegraph company, the defendant below, to deliver at Ottumwa, in Iowa, a message received by it in Indiana for transmission to that place. The Supreme Court of Indiana construed the statute above referred to as applying to the delivery of the message then in question at Ottumwa, Iowa, and affirmed a judgment in favor of the plaintiff for the amount of the penalty. On writ of error from this court, the judgment was reversed. It was held that the statutes in question were in conflict with the commerce clause of the United States Constitution " in so far as they attempt to regulate the delivery of such dispatches at places situated in other states ; " that " *the authority of Congress over the subject of commerce by telegraph with foreign countries or among the States being supreme, no State can impose an impediment to its freedom by attempting to regulate the delivery in other States of messages received*

within its own borders ; " and that the police power of the State did not extend " to the regulation of the delivery at points without the State " of messages received within, but only to the making of " all necessary provisions in respect of the buildings, poles and wires of telegraph companies *within its jurisdiction* which the comfort and convenience of the community may require."

Mr. Justice FIELD wrote the opinion of the court, saying :

> " The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where such uniformity is practicable, against conflicting State legislation. Such conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of different States, if each State was vested with power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as of their transmission, would vary according to the judgment of each State. Indiana, as seen by its law given above, has provided that communications for or from officers of justice shall take precedence, and that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order ; but that all other messages shall be transmitted in the order in which they are received ; and punishes as an offense a disregard of this rule. Her attempt by penal statutes to enforce delivery of such messages in other States in conformity with this rule, could hardly fail to lead to collision with their statutes. Other States might well direct that telegrams on many other subjects should have precedence in delivery within their limits over some of these, such as telegrams for the attendance of physicians and surgeons in

case of sudden sickness or accident, telegrams calling for aid in cases of fire or other calamity, and telegrams respecting the sickness or death of relatives.

"Indiana also requires telegrams to be delivered by messengers to the persons to whom they are addressed, if they reside within one mile of the telegraph station, or within the city and town in which such station is; and the requirement applies, according to the decision of its Supreme Court in this case, when the delivery is to be made in another State. Other States might conclude that the delivery by messenger to a person living in a town or city being many miles in extent was an unwise burden, and require the duty within less limits; but if the law of one State can prescribe the order and manner of delivery in another State, the receiver of the message would often find himself incurring a penalty because of conflicting laws, both of which he could not obey. Conflict and confusion would only follow the attempted exercise of such a power. We are clear that it does not exist in any State."

It is to be observed that the Virginia statute under consideration in the case at bar is quite similar to the Indiana statute considered in W. U. Tel. Co. vs. Pendleton. Like the Indiana statute it contains a provision that:

"Nothing herein shall prevent any such company from giving preference to dispatches on official business, from or to officers of the United States or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers, for the transmission to them, for publication, of intelligence of general and public interest out of its regular order."

Every word said by Mr. Justice FIELD applies as well to the Virginia statute as to that of Indiana.

There is nothing in the law of New York, or of any of the States intervening between Virginia and New York, or of the District of Columbia, which would authorize a telegraph company to prefer a dispatch sent on the official business of the State of Virginia: the laws of some of the intervening States do not authorize the preference of messages addressed to newspapers.* If the State of Virginia may lawfully insist that this message shall be transmitted from Richmond to New York in the order of its priority, the State of New York and perhaps the intervening States have an equal right to prescribe a different order. They might prescribe, as some States have done,† that messages relating to sickness and death shall be preferred to other private messages; or they might insist, severally, on a preference being accorded, in transmission through its territory, to messages on the official business of each State. The very conflict and confusion which the commerce clause of the Constitution as interpreted and expounded in the Pendleton case was designed to prevent would necessarily follow. If there is to be any regulation as to the order in which messages shall be transmitted from one State to another, and any penalty

---

* In none of the States involved, other than Virginia, is there any provision for preference of messages sent on the business of the State. In the District of Columbia (as elsewhere throughout the United States) Government messages have preference over all others (Title 65, U. S. Rev. St., § 5263 *et seq.*). In Delaware, New Jersey and (except as above stated) the District of Columbia there are no statutory provisions whatever as to the order in which messages shall be transmitted. In Maryland and New York there are statutes expressly requiring that they shall be transmitted in the order of their receipt, with the exception, similar to that in the Virginia statute, of certain messages addressed to the proprietors of newspapers (Md. Pub. L., 1904, § 328; N. Y. Cons. L., 1909, c. 63, § 103). In Pennsylvania the statute requires that messages shall be transmitted "in regular order" (Brightley's Purdon's Dig. 1895, p. 2001).

† As, for example, California (Civil Code of 1897. Section 2207) and South Dakota (Civil Code, § 1604).

imposed for a deviation from that order, the regulation must be made by Congress and not by the State of origin or by the State of destination or by any State between.

II.

Under the statute in question the place of the default is immaterial, for there could be no recovery even if such default had been in Virginia.

The plaintiffs below claimed to be entitled to judgment, and it was obviously the theory of the trial court that they were entitled to judgment, for the reason, and for the reason only, that in their view of the record there was evidence from which a jury might have inferred that there was *some default, some negligence*, on the part of some one of the company's agents *within the State of Virginia.*

But the fatal objection to this theory is that there is no statute in Virginia which imposes a penalty of one hundred dollars on a telegraph company in case any one of its agents within the State *is negligent*, or is guilty of *some default.* The statute under which the recovery was had is a statute that requires the telegraph company TO TRANSMIT MESSAGES as promptly as practicable. The act required by the statute is *the act of transmission*, not the act of preparing or endeavoring or making ready to transmit; and the act of transmission is, as has been seen, an act which in its nature cannot be completely performed within the State of Virginia and the failure to perform which cannot therefore be said to be a default committed within the State of Virginia.

III.

There is no competent evidence of any default in Virginia.

At all events it was conceded by the plaintiffs below and recognized by the trial court that a recovery could not be permitted unless the plaintiffs, as a part of their case, alleged and proved that the breach of duty on which they relied for recovery occurred within the State of Virginia. For that reason the plaintiffs were compelled to amend their declaration as originally filed (record, page 1) by inserting the words "which negligence occurred within the State of Virginia" (declaration as amended April 30, record, page 6; and declaration as finally amended, record, page 7). For that reason, also, the trial court in its memorandum on giving judgment against defendant on the demurrer to the evidence stated that in its opinion the jury might have found

> "that negligence occurred here in State of Va. in Richmond office—in other words, that message was sent to Brooklyn, N. Y., and not to Brockton, N. Y., and *the message was so sent from the Richmond office*, and that delay was from about 9 or 9.30 in the morning until after 5.30 in the evening, at least as notice of company shows."

Unless this court is bound by the conclusion of law of the trial court as to what facts a jury might have inferred from the testimony, it is open to plaintiff in error to argue here that a jury could not have drawn from the testimony any inference that the message was incorrectly sent from or negligently delayed at the Richmond office; and if not, even the trial court recognizes that the judgment should not be allowed to stand.

The undisputed testimony showed that the message

was not and could not have been sent from Richmond to Brooklyn, N. Y., *direct.* It had to be and was in the first instance sent from Richmond to New York City. It is certainly conceivable—and counsel understand it to have been the fact—that the message was sent correctly by the Richmond operator, addressed to Brockton, N. Y.; that it was *received incorrectly by the New York operator, reading "Brooklyn," N. Y.;* that it was then sent to Brooklyn instead of to Brockton by the sending operator in New York; and that when Brooklyn reported to Richmond by "service message" that it was undelivered, the clerk in the Richmond office who handled the message from Brooklyn failed to note *the error that had been made in New York* and consequently failed to correct it. How easy it would be to fail to note this error is plain from the fact that the plaintiffs themselves failed to note it, or to correct it, when the notice was delivered to them.

Now it is not pretended that the statute authorizes the recovery of a penalty against the defendant because its clerk at Richmond, long after the message had been transmitted to another State, failed to notice and to correct an error that had been made in New York. The message had been transmitted once. The statute did not and could not constitutionally require, because some agent of the company outside the State had been negligent, that the company's agents within the State should transmit the message again.

It may be suggested that if the facts were as above recited it was defendant's duty to show them. But this is a penal action. Even in an ordinary action at law, and especially in a penal action, it is not the defendant's duty to disprove the plaintiff's case; it is the plaintiff's duty to prove it. There was no evidence from which a jury could have inferred that any operator in the Richmond office was responsible for the incorrect transmission of the message; and there is no evidence from which a jury could have inferred

that there was any delay in its transmission from Richmond.

Suppose the undisputed testimony in the case had shown that the message was filed at Richmond at 9 A. M. ; that it was transmitted to New York at 9:01 A. M. ; that it never came back into the State of Virginia, and that it never reached Brockton, N. Y., and suppose there had been no explanation of the failure to transmit it further. Suppose that, on this record, the trial court had rendered judgment for the plaintiffs on the express ground that in its opinion the jury might have inferred, from the defendant's failure to introduce testimony with regard to the transmission service beyond New York, that there had been negligence in Virginia. Would this court be bound by this erroneous conclusion of the trial court ? It is conceived that this court would not be thus bound, but that it would be open to plaintiff in error to argue here that there was no evidence from which the jury could have found that there was a default in Virginia. As a matter of fact, that is the precise condition of this case, except that, in addition, plaintiffs have shown that the defendant's agent in Richmond admitted to them that the message had gone astray to Brooklyn, *without, however, admitting that it was in consequence of any negligence in Virginia that it had gone astray,* and the testimony distinctly showing, without contradiction, on the other hand, that such messages were first sent from Richmond to New York City to be relayed, so that this admission of the operator cannot be construed as meaning that the sending operator in Richmond had called the *Brooklyn* office on the wire and transmitted the message to Brooklyn from Richmond direct.

The plaintiff in error respectfully insists that there was no evidence for a jury on the question whether a breach of duty of the character contemplated by the statute under consideration had occurred in the State of Virginia ; that the trial court erred in

holding that there was ; that this court is not bound by the trial court's error of law in this regard, and that, in the absence of some competent evidence in the record as to *where* the breach of duty occurred, the judgment should be reversed even on the theory of the trial court and of plaintiffs themselves.

Respectfully submitted,

GEORGE H. FEARONS,
RUSH TAGGART,
HENRY D. ESTABROOK,
FRANCIS RAYMOND STARK,
Attorneys for Plaintiff in Error.
Office and Post-office Address,
195 Broadway,
New York,
N. Y.

Office Supreme Court, U. S.
FILED.
NOV 3 1910
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of The United States

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

AGAINST

LAWRENCE J. CROVO and WALTER C. CRENSHAW, Partners, Trading as Crovo & Crenshaw,
Defendants in Error.

No. 81.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

AGAINST

LAWRENCE J. CROVO and WALTER C. CRENSHAW, Partners, Trading as Crovo & Crenshaw,
Defendants in Error.

No. 87.

REPLY BRIEF BY J. KENT RAWLEY FOR DEFENDANTS IN ERROR.

In the Supreme Court of The United States

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

AGAINST

LAWRENCE J. CROVO and WALTER C. CRENSHAW, Partners, Trading as Crovo & Crenshaw,
Defendants in Error.

No. 81.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

AGAINST

LAWRENCE J. CROVO and WALTER C. CRENSHAW, Partners, Trading as Crovo & Crenshaw,
Defendants in Error.

No. 87.

BRIEF FOR DEFENDANTS IN ERROR.

Statement.

The judgment complained of is for a penalty of $100.00 imposed by the Virginia statute (Record, p. 5) for the failure of the Telegraph Company "to transmit as promptly as practicable" a message from Richmond, Virginia, to Brockton, New York, the declaration alleging that said delay occurred "within the State of Virginia." The case was heard on a demurrer to the evidence, in which all questions of law and fact were submitted to

the trial court, which held that the delay was in the Richmond office, and was "from about nine-thirty in the morning until 5:30 in the afternoon."

Application for a writ of error was then made to the Supreme Court of Appeals of Virginia, which was refused, "the court being of opinion that said judgment is plainly right."

The Testimony.

The evidence, which is not in the form of a stenographic report, was written out afterwards, and necessarily sets out but imperfectly the testimony, facts and circumstances on which the trial court, after hearing the witnesses testify in person, based its decision. In accordance with the practice in Virginia, the evidence is written out from memory by counsel, and, if approved by the court, is so certified, but if there is a disagreement among counsel, the court certifies the facts. Even from a casual reading of the record in this case it will appear that the trial court was not satisfied with the evidence certified, but deemed it proper to certify that certain *facts were proven*, namely, "that the message was sent to Brooklyn, N. Y., and not to Brockton, N. Y., and the message was *so sent* from the Richmond office." (Record, p. 13.) By which the trial court certifies in no uncertain manner that there was evidence before the court to the effect that the mistake was made in the Richmond office and that the operator in the Richmond office changed the address, and committed the error which caused the delay, instead of the operator in New York (as is intimated by counsel for plaintiff in error, without any evidence in the record on which to base such intimation).

The trial court further certified (Record, p. 10) that the witness Stephenson testified that the notice sent the defendant in error at 5:30 in the afternoon "meant that the message was sent *from Richmond, Va., to Brooklyn, N. Y., and not to Brockton, N. Y.*" The obvious meaning of which is that the message was *addressed* to Brooklyn by the operator in the Richmond office, and was not addressed to Brockton.

In reply to the suggestion of counsel for plain-

tiff in error, on page 18 of their brief, that "counsel understands it to have been a fact that the message was sent correctly by the Richmond operator addressed to Brockton, N. Y., and was received incorrectly by the New York operator," it is respectfully submitted that there is not only no evidence in the record to support such a statement, but the *direct and positive testimony of the witness Stephenson is to the contrary, and the opinion of the court is conclusive.*

It appears further that the defendants in error were compelled to amend their declaration by inserting the words "which negligence occurred within the State of Virginia," by which the plaintiff in error was put on notice, if indeed such notice was necessary, that in order to defeat recovery all that was necessary was to introduce the operator who sent the message, to prove that it was sent from Richmond correctly. Is it conceivable that the astute counsel for the Telegraph Company would have failed to furnish this very evidence, if it was possible to do so, instead of the witness Stephenson, who testified to *just the contrary?*

ARGUMENT.

I.

Under the rules of decision in Virginia, upon a *demurrer to evidence* by the defendant, if there is any evidence on which a jury might have found for the plaintiff, the court *must overrule such demurrer.*

Horner v. *Speed,* 2 Patt. & Heath (Va.) 616.
University v. *Snyder,* 100 Va. 567.
R. & W. Land Co. v. *West Point,* 94 Va. 668.
Rudd v. *R. & D .Ry.,* 84 Va. 546.
Milton v. *N. & W. Ry.,* 108 Va. 752.

II.

That the delay occurred in Virginia is a conclusion of fact decided by the trial court, and approved by the Supreme Court of Appeals of Virginia, and is not subject to review by this court.

Hence the issue as to whether the delay occurred in the State of Virginia has been twice passed upon by the courts of Virginia, and this court will not "review the finding of the facts made in the State courts, but will accept the finding of the court of the State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court." (*Waters-Pierce Oil Co.* v. *Texas,* 202 U. S. 86.)

Paul v. *Del., L. & W. Ry.,* 130 Fed. 951.
Bridge Co. v. *Kansas Ry.,* 92 U. S. 315.
St. Louis v. *Rutz,* 138 U. S. 223.
Hathaway v. *Cambridge Natl. Bank,* 134 U. S. 498.
Eagan v. *Hart,* 165 U. S. 188.

III.

The Virginia statute requires that the message shall be transmitted "as promptly as practicable," which is the plain duty of the company under the general law of the land, and is in aid of rather than a burden upon or an obstruction of commerce.

> "It can not be doubted that there is ample power in the legislative department of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railroad companies, as carriers of persons and goods, to accommodate the public, impartially, and to make any reasonable provision for carrying with safety and expedition." (Cooley's Const. Law, 6th Ed., p. 715.)

The Pendleton Case.

In *W. U. Tel. Co.* v. *Pendleton* (122 U. S. 347) the principal question was as to the validity of an Indiana statute imposing a penalty for failure to deliver a telegram in *another State,* and the right of a State to "regulate the delivery in another State" was denied.

This Indiana statute provided that "communications for or from officers of justice *shall* take precedence and arrangements may be made with

publishers of newspapers for the transmission of intelligence of general and public interest out of its order."

It will be seen that this provision in the Indiana statute is *manditory,* and may affect the order of sending of interstate messages.

Compare the Virginia statute:

> "*Nothing herein shall prevent* any such company from giving preference to dispatches on official business from or to officers of the United States or the State of Virginia or from making arrangements with proprietors or publishers of newspapers for the transmission to them for publication of intelligence of general and public interest out of its regular order."

There is not a word *requiring* the Telegraph Company to give preference over any class of messages, and the order of transmission is left entirely to the company. The only effect is to *absolve from liability* in case this order is departed from in the instances enumerated in the statute. Neither is there any evidence that in the case at bar the delay was due to any precedence being given to any messages of the classes enumerated.

In *Owners of Brig James Gray* v. *Owners of Ship John Fraser,* 21 Howard 184, the constitutionality of an ordinance of the city of Charleston providing that no vessel should be in the harbor for more than 24 hours and inflicting certain penalties for disobedience was upheld. The court said:

> "Regulations of this kind are necessary and indispensable in every commercial port for the convenience and safety of commerce. And the local authorities have a right to prescribe at what wharf a vessel must lie, and how long she may remain there; where she may unload or take on board particular cargoes; where she may anchor in the harbor, and for what time; and what description of light she shall display at night to warn the passing vessels of her position, and that she is at anchor and

not under sail."

A vessel engaged in interstate commerce is no less an "instrument of commerce" than is a telegraph company, and if a State has a right to regulate all matters concerning her stay in the harbor, including the *length of time* she may stay in the harbor, certainly a State should have an equal right to say how long a telegram may be held before it is transmitted, when no attempt is made to regulate or interfere with its transmission after it is begun.

In *Railroad Co.* v. *Fuller,* 17 Wall. 560, the validity of an Iowa statute which required the railroads to fix and publish freight rates at certain stated periods and imposing a penalty for failure, the court said:

> "In this there is nothing unreasonable or onerous. The public welfare is promoted, without wrong or injury to the company. The statute was doubtless deemed to be called for by the interests of the community to be affected by it and rests upon a solid foundation of reason and justice. It is not in the sense of the Constitution in any wise a regulation of commerce."

The James Case.

The validity of a similar statute has been so fully considered in the case of *Western Union Telegraph Co.* v. *James,* 162 U. S. 650, which decision has for nearly twelve years been recognized and approved by so many decisions of both State and Federal courts that we deem it unnecessary to do more than refer to the following extracts from the opinion of Mr. Justice Peckham:

> "The validity of the statute is based upon the general power of the State to enact such laws in relation to persons and property within its borders as may promote the public health, and public morals and the general prosperity and safety of its inhabitants."
>
> "Legislation which is a mere aid to commerce may be enacted by a State although

at the same time it may incidentally affect commerce itself."

"The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company."

"No tax is laid upon any interstate message, nor is there any regulation of a nature calculated to at all embarrass, obstruct or impede the company in the full and fair performance of its duty as an interstate sender of messages."

"The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is *not in addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by a general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not.*"

"So long as Congress is silent upon the subject we think it is within the power of the State government to enact legislation of the nature of this Georgia statute. It is not a case where the silence of Congress is equivalent to an express enactment. As has been said, this statute levies no tax and seeks no revenue from the company by reason of these interstate messages."

"The subject of this act is not national in character, nor is uniformity at all requisite."

"Nor is the statute open to the same objections that were regarded as fatal in the Pendleton Case, 122 U. S. 347. No attempt is here made to enforce the provisions of the State statute beyond the limits of the State, and no other State could by legislative enactment affect in any degree the duty of the company in relation to the delivery of messages within the limits of the State of Georgia."

"It is not a regulation of commerce, but a provision which incidentally affects it." "We think the statute in question is a valid exercise of the power of the State over the subject matter."

This decision has been followed and approved in the following cases:

Hennington v. *Georgia*, 163 U. S. 299.
N. Y. & N. H. R. R. v. *New York*, 165 U. S. 628.
Chicago, M., &c., Ry. v. *Sloan*, 169 U. S. 133.
Cleveland, &c., Ry. v. *Ill.*, 177 U. S. 514.
W. U. Telgh. Co. v. *Wilson*, 213 U. S. 52.
Nashville v. *Ala.*, 128 U. S. 96.
Smith v. *Ala.*, 124 U. S. 465.
Commonwealth v. *Alger*, 7 Cush. 53.
Lake Shore Ry. v. *Ohio, &c.*, 173 U. S. 285.
Miss. Pacific Ry. v. *Larabee*, 211 U. S. 621.
Ark. Ry. v. *German Natl. Bank*, 77 Ark. 489.
U. S. Express Co. v. *State*, 164 Ind. 204.
W. U. Telgh. Co. v. *Hughes*, 104 Va. 241.
Postal Telgh. Co. v. *Umstader*, 103 Va. 744.
A. C. L. R. R. v. *Commonwealth*, 102 Va. 616
W. U. Telgh. Co. v. *Powell*, 94 Va. 268.

The defendants in error therefore respectfully submit that

(1) There was sufficient evidence of the fact that the delay occurred within the State of Virginia.

(2) This court will not review a question of fact which has been twice passed upon by the courts of a State.

(3) The Virginia statute does not require that preference shall be given to any particular class of messages; and could not in any way come into conflict or interfere with the lawful regulations of any other State through which an interstate message might pass.

(4) The statute in question is in aid of performance of a duty of the company that would exist by the general law of the land independently of any statute, and is in nowise a burden upon or an obstruction to interstate commerce.

Respectfully submitted,

J. KENT RAWLEY,
Attorney for Defendants in Error.

Office and postoffice address, Richmond, Va.

WESTERN UNION TELEGRAPH COMPANY *v.* CROVO.

ERROR TO THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND, STATE OF VIRGINIA, AND THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Nos. 81, 87. Argued March 6, 7, 1911.—Decided April 3, 1911.

Where the highest court of the State has refused a writ of error because it thought the judgment of the court below was right, the writ of error from this court lies to the highest state court to which the case could be carried.

Telegraph companies whose lines extend from one State to another are engaged in interstate commerce, and messages passing from one State to another constitute such commerce, and companies and messages both fall under the regulating power of Congress.

While a state statute which amounts to a regulation of interstate commerce is void, one which simply imposes a penalty on a telegraph company for failure to perform a clear common-law duty, such as transmitting messages without unreasonable delay, is, in the absence of legislation by Congress on that subject, a valid exercise of the power of the State, if it relates to delay within the State even though the message be to a point without the State. Such a statute is neither a regulation of, nor hindrance to, interstate commerce, but is in aid thereof; and so *held* as to the statute of Virginia to that effect.

THE facts, which involve the constitutionality, under the commerce clause, of a statute of Virginia requiring prompt transmission of messages by telegraph companies, are stated in the opinion.

Mr. Francis Raymond Stark, with whom *Mr. George H. Fearons*, *Mr. Rush Taggart* and *Mr. Henry D. Estabrook* were on the brief, for plaintiff in error:

The State cannot impose a penalty for failure to transmit a message "as promptly as practicable" over a direct

wire from a point within to a point without the State. *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347.

If one State may lawfully insist that messages shall be transmitted in order of priority, other intervening States have an equal right to prescribe a different order, *e. g.* that messages relating to sickness and death shall be preferred to other private messages, etc. See Title 65, U. S. Rev. Stat., §§ 5263 *et seq.;* Md. Pub. L., 1904, § 328; N. Y. Cons. L., 1909, c. 63, § 103; Brightley's Purdon's Dig., 1895, 2001; California Civil Code of 1897, § 2207; South Dakota Civil Code, § 1604.

Under the statute in question the place of the default is immaterial, for there could be no recovery even if such default had been in Virginia. There is no competent evidence of any default in Virginia.

Mr. J. Kent Rawley for defendants in error:

The Virginia statute requires that the message shall be transmitted as promptly as practicable, which is the plain duty of the company under the general law of the land, and is in aid of rather than a burden upon or an obstruction of commerce. *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, distinguished. The provision in the Indiana statute is mandatory, and may affect the order of sending of interstate messages while the Virginia statute does not require the telegraph company to give preference over any class of messages, but is permissive only. See *The Brig James Gray*, 21 How. 184; *Railroad Company* v. *Fuller*, 17 Wall. 560. This case is controlled by *Western Union Tel. Co.* v. *James*, 162 U. S. 650, which has been often followed and approved. See *Hennington* v. *Georgia*, 163 U. S. 299; *N. Y. & N. H. R. R. Co.* v. *New York*, 165 U. S. 628; *Chicago, M. &c. Ry. Co.* v. *Sloan*, 169 U. S. 133; *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 514; *Western Union Tel. Co.* v. *Wilson*, 213 U. S. 52; *Nashville* v. *Alabama*, 128 U. S. 96; *Smith* v. *Alabama*, 124 U. S.

465; *Commonwealth* v. *Alger*, 7 Cush. 53; *Lake Shore Ry. Co.* v. *Ohio &c.*, 173 U. S. 285; *Missouri Pacific Ry. Co.* v. *Larabee*, 211 U. S. 621; *Arkansas Ry. Co.* v. *German Nat. Bank*, 77 Arkansas, 489; *U. S. Express Co.* v. *State*, 164 Indiana, 204; *Western Union Tel. Co.* v. *Hughes*, 104 Virginia, 241; *Postal Telegraph Co.* v. *Umstader*, 103 Virginia, 744; *Atlantic Coast Line R. R. Co.* v. *Commonwealth*, 102 Virginia, 599, 616; *Western Union Tel. Co.* v. *Powell*, 94 Virginia, 268.

MR. JUSTICE LURTON delivered the opinion of the court.

Action to recover statutory penalty for the negligent failure to promptly transmit a prepaid message accepted at the Richmond office of the telegraph company, addressed to a business correspondent at Brockton, New York. The declaration averred that the negligence occurred in the office at Richmond.

There was issue joined and a jury. The defendant demurred to the evidence. This was overruled because the court was of opinion that from the facts and circumstances the jury might find that the negligence in transmission occurred in the sending office at Richmond. There was a verdict and judgment for the plaintiff.

A writ of error was denied by the Supreme Court of Appeals, under local practice, because the court thought "the judgment was plainly right."

The plaintiff in error has sued out two writs of error, one to the law and equity court of the city of Richmond, the trial court, and another to the Supreme Court of Appeals of Virginia. Inasmuch as the latter court denied a writ of error, the judgment of the law and equity court was the highest court of the State to which the case could be carried, and a writ will therefore lie to that court if a Federal question is properly saved.

The statute which it is claimed operates as a regulation

of interstate commerce, and under which the action was brought, is set out in the margin.[1]

It makes it the duty of every telegraph company doing business in the State to receive and transmit prepaid messages "faithfully, impartially, with substantial accuracy, as promptly as practicable." But the standard of duty under the statute is precisely that imposed at common law upon such a common carrier. The imposition of a penalty for the purpose of enforcing the statute was plainly within the legislative power of the State, if the act was otherwise valid. *Ling Su Fan* v. *United States*, 218 U. S. 302, 306.

But it is said the act requires that messages shall be transmitted in the order received, though preference *may* be given to business of the United States, the State and the public press, and that this is a regulation which may conflict with a different rule prescribed by other States

[1] It shall be the duty of every telegraph company doing business in this State to receive and transmit dispatches from and for other telegraph or telephone companies or lines, and from and for any person, upon the payment of the usual charges therefor, if such payment is demanded; to transmit the same faithfully, impartially, with substantial accuracy, as promptly as practicable, and in the order of delivery to the said company. For every failure to transmit a dispatch faithfully, impartially, with substantial accuracy, and for every failure to transmit a dispatch as promptly as practicable, or in the order of its delivery to the company, the company shall forfeit the sum of one hundred dollars to the person sending or offering to send such dispatch, or to the person to whom it was addressed: Provided, however, that not more than one recovery shall be had on one dispatch, and the recovery by one party entitled thereto shall be a bar to the recovery of the other party. But nothing herein shall prevent any such company from giving preference to dispatches on official business from or to officers of the United States or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers for the transmission to them for publication of intelligence of general and public interest out of its regular order." Section 5, ch. 8 of Public Service Corporation Act, January 18, 1904.